TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 343.

LYDIA BRADLEY, APPELLANT,

vs.

H. W. LIGHTCAP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 6, 1903.

(18,994.)

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a Circuit Court of the United States, Northern District of Illinois, Northern Division.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } 26070. In Chancery.

Mr. W. W. Hammond, Mr. George R. Peck, Mr. John S. Miller, Mr. Merritt Starr, solicitors for Lydia Bradley.
Mr. E. A. Wallace, Mr. Lyman Lacey, Jr., Mr. George W. Wall, solicitors for H. W. Lightcap.

1 Pleas in the circuit court of the United States, in and for the northern district of Illinois—northern division, in chancery sitting at the United States court room, in the city of Chicago, in said district and division, before the Hon. Peter S. Grosscup, circuit judge of the United States for the seventh judicial circuit, on Thursday the twenty-second day of May, in the year of our Lord, one thousand nine hundred and two, being one of the days of the regular December term of said court, 1901, and of our Independence the one hundred and twenty-sixth year.

MARSHALL E. SAMPSELL, *Clerk.*

2 Northern District of Illinois, Northern Division.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } 26070.

Be it remembered that on this day to-wit: the twelfth day of November, in the year of our Lord one thousand nine hundred and one, came the complainant in the above entitled cause by her solicitors, Mr. W. W. Hammond and Messrs. Peck, Miller and Starr, and filed in the clerk's office of said court her certain bond for costs and bill of complaint, which are respectively in the words and figures following to-wit:

3 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

Circuit Court, —— Term, A. D. 190–.

LYDIA BRADLEY
v.
H. W. LIGHTCAP. } In Chancery. No. —.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to

any of the officers of this court; and in default of payment by the — of any costs ordered or adjudged to be paid by complainant hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against complainant.

Dated this 12th day of November, A. D. 1901.

NEWTON WYETH,
Residence 2641 *N.* 42*nd Court, Chicago.*

Acknowledged before me this 12th day of November, 1901.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

I, Newton Wyeth, a surety on the annexed bond, being duly sworn, depose and say that I am worth in personal property, situate in the northern district of Illinois, the sum of eight hundred dollars over and above my just debts and liabilities.

NEWTON WYETH.

Sworn to and subscribed before me, this 12th day of November, 1901.

S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed Nov., 12, 1901, S. W. Burnham, clerk.

4 *Bill of Complaint and Exhibits.*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } In Equity.

To the honorable the judges of said court, sitting in equity:

Your oratrix, Lydia Bradley, respectfully represents unto this honorable court that she is a citizen of the county of Peoria in the State of Illinois, residing in the city of Peoria, that the defendant, H. W. Lightcap, is also a resident of the State of Illinois, his place of residence being in the county of Cook.

That heretofore, on the 31st day of June, 1867, oratrix was the owner and holder of a certain mortgage given by Thomas B. Breedlove to secure the sum of $19,616.00 on 1200 acres of land in the county of Mason, State of Illinois, described as the north east quarter of section twenty two (22) the east half of the south east quarter of section twenty-two (22) the south half of section twenty three (23) and all of section twenty six (26) in township twenty three (23) north, range six (6) west of the third principal meridian; that afterwards said Breedlove and wife conveyed said premises, subject to said mort-

gage, to Benjamin S. Prettyman; that afterwards on the 13th day of August, 1868, Benjamin S. Prettyman conveyed a part of said premises, to-wit: the north east quarter and the north east quarter
5 of the south east quarter of section twenty two (22), the south half of section twenty-three (23) and the north half of the north half of section twenty-six (26) township and range aforesaid, to Absalom McCune, and on the same day procured from said Absalom McCune a trust deed conveying the last above described premises to E. G. Johnson, as trustee for oratrix, to secure the payment to oratrix of three notes which were drawn payable to her order, each for the sum of $5,000, due in one, two and three years from date; that afterwards said Prettyman taking the said Absalom McCune trust deed and notes to the agent of your oratrix delivered them to him in part payment of said Breedlove indebtedness and secured from her a release of all the lands not included in the said McCune trust deed, being about 520 acres; that afterwards on the 13th day of November, 1868, said Absalom McCune and wife re-conveyed the 680 acres last above described to said *said* Benjamin S. Prettyman; that oratrix held said notes of McCune until sometime in 1871, when she discovered that he had departed from the State of Illinois after the execution of said papers and his residence could not be ascertained; that the lands covered by said trust deed *was* swampy and practically worthless, and that the portion she had released was the only valuable land in the original Breedlove mortgage that no taxes had been paid on said 680 acres of land in said McCune trust deed from the date of said trust deed. Thereupon oratrix redeemed said land from tax sales and paid the current taxes, and at the March term, 1872, filed a bill in chancery in the circuit court of Mason county against said Prettyman, McCune and all other persons interested in said real estate alleging that she had been induced to accept said McCune notes by fraudulent misrepresentations as to the value of the lands upon which
6 they were secured, and praying the court to set aside the release of said Breedlove mortgage and grant a foreclosure thereof upon said 1200 acres of land, a copy of which bill (except the exhibits thereto) and of the answer of said Prettyman thereto is filed herewith and made part hereof as "Exhibit A." At the same time and while said bill was pending, in the summer of 1872 oratrix visited the land- included in said McCune mortgage and found them vacant and unoccupied She thereupon at that time employed one Allison Breedlove, who resided in the immediate vicinity, as her agent and representative to take possession of said 680 acres of land for her and to look after said property, and put him in charge thereof to rent the same for pasture and cut hay from such lands as were dry enough, agreeing to give him one-half of the net proceeds arising therefrom; that said Breedlove on her behalf and as her agent entered into active possession of the property and used it in the manner aforesaid, putting up fences as they were needed to keep in stock and cutting and selling hay from

such portions of the property as could be mowed, and continued in actual, open, visible and exclusive possession of said 680 acres of land until 1878, at which time oratrix leased all of said lands to one John Coddington and ditched and drained the same so that they could be farmed, and said Coddington received the actual possession of the same from said agent of oratrix, said Breedlove, and from that time forth said Coddington was in the actual, open, visible and exclusive possession of said lands as tenant of oratrix, and gradually reduced them to cultivation, fenced and improved them, erected suitable farm buildings and reduced all of said property to a high state of cultivation. That oratrix joined in forming a drainage district by which all of said lands were thoroughly
7 drained and thereby became of great value as farming lands; that after all the title and right of redemption of said Prettyman had expired and become barred and lost, and after the expiration of fifteen months from and after the master's sale in 1879 hereinafter mentioned was made, and prior to the commencement of the ejectment suits hereinafter mentioned, and relying on her absolute and complete right and title in and to the said 680 acres of land and upon the bar and extinction and loss of the right or equity of redemption of said McCune, or of those claiming under him subsequent to said trust deed to said Johnson, your oratrix expended about $5,000 in such drainage district, about $5,000 in improvements and over $5,000 in current taxes upon said property; and that your oratrix by her tenants has remained in actual, open, visible and exclusive possession of said 680 acres of land continuously since the summer of 1872 to the present time, and still remains in such possession; and that she has all said time been and is in such actual possession as owner, claiming to be the owner in fee in said premises.

That said bill in chancery in said circuit court of Mason county was contested by said Prettyman and was pending in said court until 1879, at which time a decree was rendered by said court adverse to complainant's prayer, ordering and decreeing a foreclosure of the said McCune trust deed instead of a foreclosure of the said Breedlove mortgage as prayed; a copy of said decree of foreclosure is filed herewith, marked "Exhibit B" and made part hereof by reference. That pursuant to said decree the lands in said McCune trust deed were exposed for sale by the master in chancery, and oratrix, who was in possession and claiming to own said lands in order to prevent an adverse claim arising by means of such sale procured the said lands to be struck off to her for the sum of $10,000,
which was applied upon the amount found due upon said
8 McCune notes, leaving a deficit still due from said McCune to her of $21,000. No personal judgment was obtained against said McCune, who had left the State of Illinois, the service upon him being by publication, but the decree provided that said McCune should remain liable to oratrix for the deficiency remaining after said sale but no part of said deficiency has ever been paid nor has said McCune returned to this State.

Oratrix further shows that the time allowed by said decree from redemption of said lands from such sale expired on the 27th day of January, 1881, and that no redemption of effort to redeem was made by said Prettyman, McCune or any other defendant in said action, nor did either of them ever assert any claim to said property or the possession thereof, but oratrix was then and thence continued in uninterrupted, actual, exclusive, adverse possession by her tenants, of the said 680 acres of land hostile to all the world besides, and has thence hitherto continued and still continues in such actual and exclusive and adverse possession.

That long afterwards, on the fourth day of September, 1893, said Benjamin S. Prettyman executed and delivered to the defendant herein a quitclaim deed of said 680 acres of land, which deed was placed of record in the reco-der's office of Mason county on the 30th day of November, 1894. But oratrix alleges that at the times when said conveyance was made and recorded your oratrix was in the actual, open and visible possession of said 680 acres by her tenants as aforesaid, and that said Lightcap was by such possession charged with notice of the rights, title, claims and equities of your oratrix; and your oratrix upon information and belief charges
9 that said Lightcap had at and before said conveyance to him actual notice and knowl-dge of the rights and equities of your oratrix, and that no actual, valuable or real consideration was paid by the defendant, Lightcap, for said 680 acres of land, or for the said conveyance thereof.

On the 13th day of July, 1895, the defendant herein commenced actions of ejectment against the tenants of oratrix in possession of said lands, in the circuit court of Mason county, claiming to be the owner of said lands in fee simple. These cases were consolidated and oratrix as landlord defending was substituted as defendant in said suits, and at the March term, 1896, a trial was had in the circuit court of Fulton county, to which the cases had been transferred on the motion of oratrix resulting in a finding for defendant therein of not guilty, and a judgment in favor of defendant therein. From this judgment the defendant herein appealed to the supreme court of the State of Illinois and at the October term, 1898, that court handed down an opinion reversing said judgment and remanding the cause. At the same term oratrix presented a petition for rehearing, which was allowed, and at the December term, 1898, the case was re-argued. October 19th, 1899, the said supreme court of the State of Illinois re-affirmed its former opinion, but afterwards of its own motion granted a second re-hearing and the case was again argued before the court at the February term, 1900. On the 19th day of October, 1900, the final opinion of the supreme court of the State of Illinois was filed, adhering to its order reversing the judgment and remanding said cause for further proceedings in accordance with the views therein expressed. A copy of said opinion is filed herewith, marked "Exhibit C" and made part hereof by reference.

That the controversy involved in said litigation was as to
10 the effect of the statute of the State of Illinois, section 30, chapter 77, approved March 22, 1872, in force July 1, 1872, which provides as follows:

"When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time for redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time for redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void, but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed."

In the construction of this statute the supreme court of the State of Illinois in its said final opinion used the following language:

"Before the enactment of the statute rendering a certificate of purchase null and void at the expiration of five years, this court had fixed a limitation which it deemed equitable in Rucker *v.* Dooley, 49 Ill. 377, and when the legislature, acting within their unquestionable powers changed the rule by this statute, it was upheld as valid in Ryhiner *v.* Frank, 105 Ill. 326. The effect of the statute has been several times considered, and it is no longer an open question. In Seeberger *v.* Weinberg, 151 Ill. 369, the court, after referring to the statutes, said (p. 380): 'If, then, it be assumed, as seems most probable, that Seeberger failed to obtain a master's deed, his right to obtain such a deed is barred by limitation, and his certificate of purchase has ceased to be of any validity. Whether the lapse of time is to be given the effect of extinguishing his right or of merely barring his remedy, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity. At the expiration of five years he became for all practical purposes, a stranger to the property, and had no more dominion over it or power to convey it than he would have had if he had never had any interest therein. The statute above referred to was considered by this court in Ryhiner *v.* Frank, 105 Ill. 326, and it was there held that where land was sold on execution, and the sheriff's deed was not taken out within five years from the expiration
of the statutory period of redemption, the certificate of
11 purchase becomes void, so that a sheriff's deed subsequently issued thereon is a nullity and passes no title. So in Peterson *v.* Emerson, 135 Ill. 55, it was held that after the expiration of

the five years given by the statute for taking out a master's deed the certificate becomes a nullity, and a court of equity cannot compel or authorize the execution of a deed to the purchaser or his assignee by the officer whose duty it is to make such deeds. Such being the condition of Seeberger's title, it is difficult to see upon what legal or equitable principle he can now be entitled, as against the grantees of Farr, to any portion of the relief prayed for in the bill. His certificate of purchase being *functus officio* and void, he certainly could have no remedy against the heirs or representatives of Farr if they had still retained their interest: no remedy could have been asserted by him upon the certificate, as that had become a nullity; nor could he have enforced any remedy upon the original mortgage, as that remedy had been completely exhausted by the foreclosure and sale.' Again in Brown *v.* Ridenhower, 161 Ill. 239, the decisions of the court were reviewed, and it was held that the holder of a certificate of purchase which had become void under the statute has no remedy against the grantees of the mortgagor; 'that he can assert no remedy upon the certificate as that has become a nullity and can enforce no remedy upon the original mortgage as that remedy was exhausted by the foreclosure and sale.' The court repeated what was said in Seeberger *v.* Weinberg, that the purchaser had no further interest in the premises.

In Peterson *v.* Emmerson, 135 Ill. 55, it was held that a purchaser whose certificate has been barred by the statute of limitations has no equitable right to a title. In that case, Elizabeth Emmerson, who was a purchaser under foreclosure in 1871, and had been in possession of the premises since early in 1872, but had not taken any deed on her certificate of purchase filed her bill to procure a deed. The court said (p. 60): 'It is sticking in the bark to say, that notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree by virtue thereof, the peremprory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute and an infringement of vested legal rights. * * * It does not alter the case that defendant in error has been in actual possession of the land since 1872, claiming ownership, and has paid all the taxes assessed thereon. Such acts do not so take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor. If she has gained any rights by virtue of such possession, claim of ownership and payment of taxes, the courts will, doubtless, if called upon, protect her therein; but surely the existence of such rights, if any there be, does not afford just and equitable grounds for transferring to her a legal title to which she is not entitled under the law of the land.

Counsel urge that a statute of limitation cannot transfer title, and therefore the failure to take a deed did not transfer title to plaintiff.

There is no pretense that a statute of limitation can transfer
12 title, but the certificate of purchase was never color of title. It conferred a right to obtain a title, and recited that at a cer

tain time and upon a certain condition the holder would be entitled to a deed conveying the title. The right so assured to the defendant by the certificate became barred, so that no deed could be taken. The certificate took away no vested right or title, but merely provided for the neglect of the defendant to take out a deed, so that the right to receive a deed conveying the legal title was lost. All limitations are in the same category. As against every right, except that of the purchaser, the law recognizes the mortgagor or his grantee as the owner of the premises, and her right and lien have been barred and the title has been freed from it."

But your oratrix respectfully shows that the statute thus construed by the court as divesting her of all right, title or interest to said premises by reason of her failure to take out a deed on the certificate of purchase hereinbefore set forth was enacted after the date of the said McCune trust deed and the said case of Rucker *v.* Dooley, 49 Ill. 377, referred to by said supreme court as having established a limitation upon the time for taking out a deed on such a sale at twenty years was not decided until September 1868, more than a month after the date and execution of said McCune trust deed. That at the date of said McCune trust deed the statute of 1845 was in force in the State of Illinois, and that by said statute there was no time limited within which the holder of a certificate of purchase must take out a deed.

And oratrix further shows that the law of the land as established by the decisions of the courts of last resort in the State of Illinois on the 13th day of August, 1868, was that the holder of a mortgage after condition broken was the real owner as against all the world, and that thereafter the mortgagor had only an equity of redemption which was an equitable right the creation of the courts of chancery, and that after a foreclosure or an effort to foreclose a mortgage by the mortgagee followed by possession of the premises the mortgagee's holding was considered adverse as to all the world
13 and under the title derived by and through the mortgage the mortgagor held as under claim and color of title. That unless the mortgagee redeemed in accordance with the provisions of the decree or the statute that he lost his equity of redemption, and thereafter the mortgagee was the sole owner of both the legal title and the equity of redemption.

And oratrix respectfully shows that the laws of the land as established by legislative authority and the judicial decisions of the courts of last resort, as they exist at the date of a contract become a part of it, and cannot afterwards be changed so as to impair the obligation of that contract or materially infringe upon the legal remedies provided for its enforcement.

Your oratrix shows that the said statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, as the same has been construed by the decision of the supreme court of Illinois, as aforesaid, if the same are enforced against your oratrix, do or would impair the obligation of the contract of the said trust deed from the said Absalom McCune to said Johnson as trustee for your oratrix,

and has and will deprive your oratrix of her rights and remedies as they existed at the date of said contract contrary to the provisions of sec. 10, art. 1 of the Constitution of the United States of America, and that there exists in this case a controversy necessarily involving the construction of the Constitution of the United States of America as applicable to the said statute of the State of Illinois, and the decisions of the supreme court of the State of Illinois.

And your oratrix further shows that the said statute of Illinois of 1872 as construed by the supreme court of Illinois, is not
14 merely a limitation law, but is a law professing and attempting, as so construed, and as applied to this case, to deprive your oratrix of the vested right and title which she had on the 28th day of January 1881 (when the period of fifteen months after said master's sale had fully expired) and thence thereafterwards for five years after said 28th day of January, 1881, and to terminate and put an end to that right and title; and she submits and charges that the said act as so construed and applied by the supreme court of Illinois would deprive your oratrix of her said property without due process of law.

And oratrix further shows that after the order of reversal was entered in the supreme court of Illinois as above set forth, said cause came up for trial in the circuit court of Fulton county, which court applying the said statute of 1872 as so construed by the said supreme court, and after the introduction of evidence showing substantially the facts hereinbefore set forth, directed the jury to find oratrix guilty and the defendant the owner of said lands in fee simple, and the jury was compelled so to find, and notwithstanding oratrix' motion for a new trial, judgment was entered in accordance therewith.

And oratrix respectfully submits that she has fully presented her defense at law, and that she is without remedy in this case, except in this court of equity. That it has been repeatedly decided by the supreme court of the State of Illinois both in the several hearings of this case and in other cases, construing and applying the said statute of 1872 to deprive her of her said property and right, that she has no remedy in a court of law. Yet your oratrix maintains she is the equitable owner of the premises in controversy, that by his trust deed to E. G. Johnson, trustee, August 13th, 1868, Absalom McCune
15 vested the legal title in said trustee and oratrix as the holder and owner of the notes described therein became the *cestui que trust*, and afterwards when the condition of said trust deed was broken and oratrix reduced the property to possession she became the equitable owner; that she has protected her title by paying all taxes accruing thereon and by buying in the lands at the master's sale, and has maintained her possession, claim and ownership ever since, while the said McCune and his grantee Prettyman, failed to redeem said lands according to the provisions of the decree of sale, made no claim to possession for more than twenty years, and have witnessed the development and improvement of said property and its growth in value by the expenditures of large amounts of money

by your oratrix as aforesaid from a worthless swamp to a highly cultivated and valuable farm, without revealing their intention to claim ownership to both land and improvements. That in all the proceedings in the circuit court of Mason county by which oratrix sought to recover again the 520 acres of released land resulting in the foreclosure of the McCune mortgage, the sale of the land and its purchase by oratrix, she has done no act inconsistent with her equitable title, nor has she omitted at any time to assert her claim of ownership, nor has she suffered any degree or judgment of any court affecting her equitable title, yet by the laws of the State of Illinois as construed and enforced by its courts of last resort, after exhausting every effort and urging her defense three times before the supreme court of Illinois, the defendant is about to recover the possession of said lands and have his title thereto in fee simple established by a final judgment of a court of record, permanently clouding, if not wholly defeating oratrix' title thereto.

16 Oratrix further shows that the statutes of the State of Illinois provide that in all actions of ejectment the defeated party may have a new trial upon payment of the costs and making a motion therefor within one year after the date of the judgment. That in accordance with said statute oratrix paid the costs in the circuit court of Fulton county, and moved for a new trial within the prescribed time and thereupon the judgment against oratrix in said court was set aside, and said cause stands for trial *denovo* at the next term of said court, which convenes the second Monday of January next. But oratrix will not be able at that trial to offer any other or different defense than that she has already presented, and under the decisions of the supreme court of the State of Illinois, constr-ing and applying the said act of 1872 to deprive her of her vested property and contract right, the result of such trial must necessarily be adverse to oratrix and result in a judgment from which she could not obtain relief unless the defendant be enjoined from the further prosecution of said suit.

And oratrix further shows that at the time she took possession of said lands in the summer of 1872, they were low, wet and swampy, and unfit for agricultural purposes, and used only for pasture and hay land during the driest part of the year. That such lands were valued at from $1.00 to $10.00 per acre, and these lands were not at that time worth to exceed $10.00 per acre. That said Benjamin S. Prettyman had become the owner of the equity of redemption by his deed from Absalom McCune prior to 1872. That he lived at Pekin within ten miles of said premises and was an intimate friend of Allison Breedlove, oratrix' tenant, and frequently visited at his house within two miles of said lands and was acquainted with all that oratrix

17 and her tenant were doing with reference to said property. That in conversation with said Breedlove he always spoke of the land as having been sold to oratrix and when reference was made to the price she had been compelled to pay for it he replied that she was able to redeem it from water and make it a good farm. That afterwards when John Coddington succeeded to the tenancy of

the place he frequently met Mr. Prettyman at Pekin and in conversations in regard to the property he spoke of it as land he had once owned. That said Prettyman continued to live in Pekin until after the date of his conveyance to the defendant herein and during all that time was fully advised of what was being done with and upon said premises. And oratrix shows that after the said Coddington became tenant of said premises she commenced making improvements thereon in the way of fencing and draining, and between the years 1885 and 1895 she built three dwelling houses, three large barns, three large corn cribs and other necessary farm buildings upon said premises at an expense of upwards of $5000. That she also paid for drainage assessments upon said premises upwards of $5000. That she also paid for breaking the land which was a very expensive task on account of the strong growth of swamp grass and the peculiar nature of the ground, and for several years after the land was broken it was practically unproductive, being infested with wire worm, cut worm, and other pests. That the soil was peculiar, being almost like peat, and highly inflammable, so that great pains had to be taken to avoid burning anything on the ground, and frequently fires would catch from unknown sources and have to be put out at great expense. That the soil was also deficient on some of the elements of normal farm land so that corn did not mature, and other crops could not be raised at all.
18 That oratrix procured analysis of the soil, and applied various fertilizers to remedy its deficiencies; and about the time the said ejectment suits were commenced, she had overcome the difficulties and rendered the soil fertile and profitable. But oratrix shows that by reason of the said difficulties and expenses she had derived no income from said lands, but had spent large sums of money upon them. And further shows that as a result of her said efforts, the land was converted from a worthless swamp to good farm lands worth in the open market $65.00 per acre. And oratrix charges that said Prettyman had full knowledge of all these facts, and yet at no time did he assert any claim of ownership to the property, or notify oratrix or her agents that he had any claim to the same, but stood by and allowed oratrix to spend said sums of money for the improvement and betterment of said premises. Wherefore oratrix shows that it would be highly inequitable and unjust to permit the defendant as the grantee of said Prettyman, to assert his title to said premises as against oratrix, and that he is equitably estopped from doing so; and in this respect oratrix has no remedy in a court of law, but can only secure relief by means of the equitable powers of this court.

In consideration whereof, and forasmuch as your oratrix is without remedy in the premises by the strict rules of law and can only have relief in a court of equity where such matters are properly cognizable, and to the end that said Henry W. Lightcap who is made party defendant to this bill, may be required to make full, true and direct answer to the same, but not upon oath, his oath being specifically waived, and that said Henry W. Lightcap may

be permanently enjoined from further prosecuting said action of ejectment in the circuit court of Fulton county aforesaid or any other court, and that by the order and decree of this court, the deed of said Benjamin S. Prettyman to said Henry W.
19 Lightcap may be ordered to be given up and surrendered for cancellation, and be held and taken, and may be declared to be a cloud upon the title of your oratrix, and that your oratrix' rights in the premises as above set forth may be declared, confirmed and established by the order and decree of this court and that your oratrix may by the order and decree of this court be confirmed in her possession and occupancy of said premises against said Henry W. Lightcap, and to the end that pending the hearing of this petition and until the matters and things herein alleged can be established and proved before this honorable court, a preliminary injunction may be issued against the defendant Henry W. Lightcap, enjoining him from prosecuting the said action of ejectment in the Fulton county circuit court or in any other court, until the final order and judgment of this court herein; and that your oratrix may have such other and further or different relief as to your honors shall seem meet and to equity shall appertain.

May it please your honors to grant to your oratrix a writ of subpœna to be directed to said Henry W. Lightcap, thereby commanding him at a certain time and at a certain penalty therein to be limited personally to appear before this honorable court, and then and there full, true, direct and perfect answer make (but not under oath) to all and singular the matters and things hereinbefore alleged and set forth, and to abide by and perform such order, direction and decree as may be made against him in the premises, and as shall seem meet and agreeable to equity.

And your oratrix also prays that a writ of temporary injunction issue out of and under the seal of this court, as aforesaid, di-
20 rected to said defendant, and enjoining and restraining the said defendant, his attorneys, representatives and agents, from prosecuting or further prosecuting the said action of ejectment in the circuit court of Fulton county, Illinois, until the further order of the court.

And your oratrix will ever pray.

W. W. HAMMOND &
PECK, MILLER & STARR,
Solicitors for Complainant.

W. W. HAMMOND &
JOHN S. MILLER,
Of Counsel.

21 EXHIBIT A.

Mason County Circuit Court, to the March Term, A. D. 1872.

LYDIA BRADLEY CLARKE
vs.
BENJAMIN S. PRETTYMAN, Thomas B. Breedlove, Absolom McCune.

In Chancery for Relief, and to Set Aside Conveyance, Reinstate Mortgage or Trust Deed, and for Foreclosure.

To the Honorable Charles Turner, judge of the twenty-first judicial circuit of the State of Illinois:

The complaint of your oratrix Lydia Bradley Clarke, of the city and county of Peoria and State of Illinois, respectfully represents and states that on or about the fifth day of May A. D. 1867, her late husband, Tobias S. Bradley, late of Peoria county aforesaid deceased, at said Peoria intestate leaving no last will and testament and leaving no children issues of her said marriage with the said Tobias S. Bradley or otherwise; and that after his decease she was duly appointed sole administratrix of the goods, chattels, property and estate which belonged to the said Bradley at his decease, and she is still acting in that capacity.

Your oratrix further states that as such administratrix she has fully paid and satisfied all claims and demands proven or outstanding against said estate and that more than four years have elapsed since she was appointed administratrix as aforesaid.

22 Your oratrix further states that she is informed and believes the law of the State of Illinois to be that she as the said widow of the said Bradley deceased, was and is entitled to and is the lawful owner in her own right of all the personal estate of the said Tobias S. Bradley deceased remaining unexpended after the payment of debts as aforesaid and that afterwards to wit, after her said appointment as said administratrix as aforesaid, on or about the thirty-first day of December A. D. 1869, she intermarried with one Edward E. Clark of the city of Memphis in the State of Tennessee and yet remains his wife, but that since her intermarriage she has continued to live and reside at the homestead in Peoria aforesaid, and that the said Clark has hitherto continued to live and reside in the city of Memphis aforesaid.

Your oratrix further states unto your honor that on or about the third day of June A. D., 1867, one Thomas B. Breedlove, then residing in the county of Mason, in the State of Illinois, was indebted to your oratrix, then Lydia Bradley in the sum of nineteen thousand six hundred and sixteen dollars and twenty-five cents as specified and shown in five promissory notes of that date signed by the said Breedlove and payable to the order of said Lydia Bradley with interest from date at ten per cent. payable annually at the

First National Bank of Peoria in the State of Illinois, each note for the sum of thirty-nine hundred and twenty-three and 45/100 dollars and payable in one, two, three, four and five years respectively, and the said Breedlove being then
23 the owner in fee of the following described lands and real estate situated in the county of Mason aforesaid, viz: the north-east quarter of section twenty-two in township twenty-three north and range six west of the third principal meridian, also the east half of the southeast quarter of the same section (22); also the south half of section twenty-three in the same township and range aforesaid; also the east half of section twenty-six and the southwest quarter of the same section in the same township and range above named; also the northwest quarter of section twenty-six above named of great value to-wit, of more than the amount of said indebtedness described in said notes—in order to secure the payment of all said indebtedness according to the tenor and effect of the notes above described together with his wife Eliza Breedlove, made, executed and delivered their deed of conveyance under their hands and seals and by them duly acknowledged, commonly called a trust deed and being in equity and law a mortgage—of the lands above herein described to one Elbridge G. Johnson, conditioned among other things for the payment of said described notes, which said — being acknowledged by the said Breedlove and wife was also duly recorded in the recorder's office of said Mason county, a copy of which said deed is hereto attached marked "A" and made part hereof, and your oratrix will ask leave on the trial of this cause to produce and offer in evidence a certified copy thereof together with a like copy of the certificates of acknowledgment and record
24 if unable to find the original for that purpose and to produce the original if found.

And your oratrix further states unto your honor that afterwards and on or about the eighth day of October A. D., 1867, the said Thomas B. Breedlove and Eliza, his wife, by their other deed of that date under their hands and seals and by them duly acknowledged pretended to convey to one Benjamin S. Prettyman of the county of Tazewell and State of Illinois the said lands described as conveyed and mentioned in the trust deed to your oratrix aforesaid in said deed to said Prettyman described as follows, viz: the east half of the southeast quarter of section twenty-two, the south half of section twenty-three and all of section twenty-six, all in township twenty-three north of range six west of the third principal meridian containing twelve hundred acres, more or less, which conveyance was made subject to the trust deed or mortgage above described and said conveyance recites a pretended consideration of twenty-four thousand dollars which your oratrix is informed and believes included the payment of the said incumbrance to your oratrix by the said Prettyman, the said Prettyman at the time assuming or agreeing to pay off the said incumbrance to your oratrix above described. A certified copy of said deed is hereto attached marked "B" and made part hereof for the purpose of showing the contents thereof and your

oratrix will ask leave on the trial of this cause to refer to and use in evidence for the purpose aforesaid the said certified copy if
25 deemed material, the original not being in the possession or control of your oratrix.

And your oratrix further states and shows unto your honor that the said Benjamin S. Prettyman on the thirteenth day of August A. D. 1868 for purposes hereinafter mentioned made or pretended to make a sale and conveyance of part of said lands described in said Breedlove's deed to him for the pretended consideration or sum of twenty-four thousand dollars and to that end, the said Prettyman and Sarah A., his wife, under their hands and seals, being dated on the day and year last above mentioned, executed a deed which was by them acknowledged to one Absolom McCune, thereby conveying to him the northeast quarter of section twenty-two, the north half of the east half of the southeast quarter of the said section twenty-two, the south half of section twenty-three, and the north half of the north half of section twenty-six, all in township twenty-three north of range six east of the third principal meridian part of lands above described as conveyed by said Breedlove to the said Prettyman and subject to the incumbrance or trust deed for the security of the debt to your oratrix aforesaid, a copy of which deed is hereto attached marked "G" and made part hereof for the purpose of stating and showing the contents of said conveyance and your oratrix will ask leave on the trial of this cause to refer to the said deed or a certified copy thereof if the original can not be obtained if deemed material by your orator and oratrix. And your orator and oratrix further state to your honor that the said deed purports to have been filed for record in the recorder's
26 office of Mason county on the fifteenth day of August, A. D. 1868 at six of the clock p. m. and to have been recorded in said office, and your orator and oratrix further show unto your honor that the said Absolom McCune on the same day and year aforesaid executed a mortgage, commonly called a sale mortgage, of the same premises so conveyed or pretended to be conveyed by said Prettyman to him to the said Prettyman conditioned for the payment to said Prettyman of the sum of eight thousand dollars specified in two notes of even date with the said mortgage payable to the order of the said Prettyman, one for the sum of three thousand dollars payable on the first day of June A. D. 1859 and the other of five thousand dollars payable on the thirteenth day of August A. D. 1872 with interest as specified in said notes, which mortgage deed purports to have been filed in the recorder's office of said Mason county on the fifteenth day of August A. D. 1868 at ten o'clock and forty minutes in the forenoon, a copy of which mortgage deed and certificate of record and acknowledgment *are* hereto attached marked "D" and made part hereof for the purpose of stating and showing the contents thereof, and your orator and oratrix will ask leave on the trial of this cause to refer to the original or a certified copy thereof if the original cannot be had if deemed material.

And your orator and oratrix further state and show unto your honor that on the same day of record, to-wit, on the thirteenth day of August A. D. 1868, the said Prettyman received from the said Absolom McCune another mortgage or trust deed that was
27 drawn up or made by the said Prettyman, and is in his handwriting wherever not in printed characters and purports to be and was to E. G. Johnson aforesaid in trust and conditioned for the payment to your oratrix, then Lydia Bradley of the sum of fifteen thousand dollars specified in three notes of five thousand dollars each of the same date aforesaid, payable to the order of Lydia Bradley, in one, two and three years after date respectively with interest from date at ten per cent., signed by said Absolom McCune, which deed was duly acknowledged by said McCune and said deed was left by said Prettyman for record in the recorder's office of said Mason county on the said fifteenth day of August A. D. 1868, at ten o'clock and thirty-five minutes in the forenoon, a copy of which deed marked "D" and notes *are* hereto attached and made part of this bill for statement of contents, and your orator and oratrix will ask leave to refer to the same and offer them in evidence on the trial of this cause.

Your oratrix further states and shows unto your honor that after the making and delivery of last mentioned deed to said Prettyman, he the said Prettyman with purpose and intent to wrong, cheat and defraud your oratrix out of her security upon the twelve hundred acres of land contained and described in the mortgage or trust deed from said Breedlove to the said Johnson for the security of your oratrix and to obtain from your oratrix the notes of Breedlove mentioned in said trust deed of said Breedlove to the said Johnson, said notes being then unpaid and still in the hands of your
28 oratrix and the sum thereupon due including interest thereon amounting to about twenty thousand dollars, and being well and abundantly secured upon said twelve hundred acres of land, and fraudulently and craftily intending to obtain from your oratrix the said notes without payment of the same and thus release himself and the said Breedlove from his obligation and liability to pay the same and to release said twelve hundred acres of land or the best and most valuable part thereof from the burden of said security proposed to your oratrix and her agents to take and receive the said mortgage deed and notes of the said McCune for fifteen thousand dollars before described in lieu of the mortgage and notes of Breedlove upon the twelve hundred acres, and give up to him, the said Prettyman, the said Breedlove notes and release the said trust deed of said Breedlove to said Johnson, and that he, the said Prettyman would pay the balance then due upon said Breedlove's notes, over and above the said fifteen thousand dollars and with the intent to mislead, cheat, and defraud your oratrix in the premises, the said Prettyman fraudulently and untruthfully and falsely represented and stated to your oratrix and her agents particularly to one Washington Cockle who was then the business agent of your oratrix and had in his charge and custody the said mortgage security and

notes of said Breedlove, that the six hundred and eighty acres of land contained in and described in the deed from said McCune to said Johnson before mentioned were the most valuable part of the said twelve hundred acres or as valuable as any part
29 thereof contained in said Breedlove's mortgage or trust deed, or that said lands were in quality as good or better than the quality *as* the balance of said lands, that they were worth thirty thousand dollars and were good security and that they were valuable, improved and cultivated land, when in truth and fact the said lands described in said mortgage or trust deed of said McCune to said Johnson as trustee aforesaid were so selected by the said Prettyman from the twelve hundred acres as to include the poorest, least valuable and unimproved of said twelve hundred acres, leaving all the best, most valuable in quality and best located and best improved of the said twelve hundred acres contained in the Breedlove mortgage in the hands or possession of the said Prettyman, and the said lands so included in said McCune deed to said Johnson were wet, low, swampy, unimproved and comparatively valueless lands, subject to overflow and unfit for agricultural purposes and not worth more than one-third to one half the said mortgage debt in said deed described, and all this well known to said Prettyman.

And your oratrix further states and charges that the said Prettyman at the time of making said proposition and representations was well acquainted with the location, position, quality and value and character of said lands as well as the whole of the said twelve hundred acres, that he well knew said lands so contained in said McCune deed were wet, low swampy lands subject to overflow of water, unfit for agricultural purposes and not worth in the aggregate more than half the amount of the said sum of fifteen thousand dollars.

30 Your orator and oratrix further state and charge that neither your oratrix or her agents had ever been upon or seen said lands nor were they acquainted with their qual-ity, relative location, quality, value or condition, and this the said Prettyman well knew.

And your oratrix further states that she, your oratrix and her agent the said Cockle, not knowing the quality value, location, character or condition of said lands and relying in that respect solely upon the false, fraudulent, untruthful and fraudulent representations of the said Prettyman, and upon his further representation and statement at the time made that said McCune was a large stock farmer and was a man of property and good and responsible for the amount of said notes, and being deceived, misled and deluded by the said wrong, false, fraudulent, untruthful representations of the said Prettyman about the value of said lands, and said Prettyman knowing it, were induced, persuaded to and did execute a release of the said Breedlove mortgage or trust deed aforesaid and did deliver up to said Prettyman the said Breedlove notes and did accept and receive the said McCune mortgage or trust deed and the notes

therein described at their nominal or face value, to-wit of fifteen thousand dollars, the said Prettyman paying to the agent of your oratrix the balance of the said Breedlove notes to-wit, about the sum of five thousand dollars, and upon the further and within guarantee of said Prettyman that there was no other incumbrance upon the lands described in said McCune trust deed or mortgage previous to the incumbrance of said deed. And your orator and oratrix attach hereto and make part hereof for the purpose of stating
31 its contents the said release of said Breedlove trust deed marked "E" and will ask leave to refer to the original and the certificate of acknowledgement thereon on the trial of this cause if the same can be found. And in default of being able to produce the same your orator and oratrix will ask leave to offer and refer to a certified copy of the same from the recorder's office of said Mason county.

And your oratrix further show- and charge- that the said McCune never took possession or occupied or assumed to possess, occupy or control said farm, that he was and is now a citizen of the State of Illinois, was not a man of plentiful means, was not a farmer or stock farmer, and your oratrix believes the fact to be and so charges that the said McCune never in fact was or intended to become the lawful purchaser or owner of said premises so pretended to be sold and conveyed to him by the said Prettyman, that he was not possessed of sufficient or visible means from or of which said debt could be made or any part of it, and that he was in fact used by the said Prettyman as a stool pigeon, cat's paw or decoy duck or tool for the purpose of procuring the discharge aforesaid, and that after the discharge aforesaid and the delivery of the said Breedlove notes to said Prettyman, the said McCune on or about the thirtieth (30th) day of November A. D. 1868, together with his wife Rahoma McCune by their deed under their hands and seals of that date and duly acknowledged and recorded, conveyed the said premises to the said Prettyman, or reconveying the said premises or lands contained in the said mortgage or trust deed of said McCune hereinbefore
32 described as delivered by said Prettyman to your oratrix, a copy of which deed is hereunto attached and made part hereof marked "F" for statement of its contents, and your orator and oratrix will ask leave to refer to and read a certified copy thereof in evidence on the trial of this cause if the original be not produced by the said Prettyman on said trial.

Your orator and oratrix further state and show that the said McCune since said deed has been absent from this State and in parts unknown to your orator and oratrix, and that he, the said McCune did not pay and has not paid the taxes legally assessed upon the land so conveyed to him by said Prettyman and the same has not been paid by said Prettyman and your oratrix has been compelled to pay the same to save said lands from being lost and will be compelled to pay other and further and larger sums for the same purpose and that the pretended sale by said Prettyman to said McCune has been canceled and revoked by reconveyance by said

parties and that the said twelve hundred acres of land contained and described in said trust deed of said Breedlove to the said Johnson for the security of the notes to your oratrix before described and the title thereof *is* now vested in the said Prettyman that he is the sole holder and owner thereof subject only to the said trust deed from the said McCune given for the security of the said fifteen thousand dollars mentioned therein, that altogether the said twelve hundred acres is worth much more than the said original debt of the said Breedlove to your oratrix and the interest thereon, and
33 whatever sum the said Prettyman may have paid the said Breedlove for his conveyance aforesaid, if in fact the said Prettyman paid the said Breedlove any other consideration for said lands than the amount of the incumbrance and debt thereon due your oratrix as hereinbefore described, or if the said Prettyman in fact paid to said Breedlove the amount of the consideration stated in said deed from said Breedlove to him inclusive of the sum due your oratrix and secured on the lands described in said trust deed of said Breedlove.

Your oratrix further states and show- unto your honor that they made repeated attempts to find said McCune and in default thereof and in default of payment by him of said indebtedness or the interest thereon described in said deed of said McCune to said Johnson to secure said notes due your oratrix as they fell due and in default of payment of *ta-es* upon said premises your oratrix caused said lands to be advertised to be sold according to the tenor and effect of power of said T. deed but before said sale being advised thereto your oratrix had the said lands visited and examined by the business agent of your oratrix which was the first time your oratrix or her agent or agents had ever been upon or seen said lands described in said McCune trust deed. When your oratrix found on such examination that the said lands were low, wet and swampy and of very little value, that such sale would not if made for the full value of said lands pay nearly the amount of the fifteen thousand dollars and the interest thereon together with the expenses of the sale and taxes unpaid upon said lands that it was not advisable to proceed to sell the
34 same, no recou-se being possible upon said McCune who could not be found and who had no known property or means from which the balance of said debt could be made and your oratrix further show- and so charge- that the parcels of land so included in said mortgage or trust deed of said McCune to said Johnson had been so craftily and cunningly selected by said Prettyman from the said twelve hundred acres described in the said deed of said Breedlove to said Johnson for your oratrix before described that they include all the poor, wet, swampy and inferior and worthless land of said twelve hundred acres and left retained by the said Prettyman all or nearly all that part of said twelve hundred acres which is really valuable for agricultural or farming purposes. And it then first became known unto your oratrix and her agents that your oratrix had been misled, cheated and defrauded in the premises and cheated and defrauded out of her just dues and securities by the fraudulent

acts of said Prettyman, your oratrix therefore further states and charges that the said release of the said Breedlove mortgage was obtained by the said Prettyman by false, fraudulent, corrupt and dishonest statements, pretentions and representations as to the value and quality and security of the said lands included in said McCune trust deed, and as to the condition, responsibility and pecuniary ability of the said McCune made by the said Prettyman to your oratrix and her agents that the said release was so obtained and the notes of said Breedlove promised to be given up to said Prettyman by said Prettyman solely for his advantage and benefit, and that he knowingly and intentionally misled and cheated your oratrix and her agents in the premises, that the debt of said
35 Breedlove was well secured, that large arrears of interest have fallen due on the same and several of the notes described in the said Breedlove's deed are also unpaid and taxes unpaid upon the premises described in said deed, and that your oratrix has the right to have the whole balance of the debt now paid whether due or not due according to the original terms of the contract, and that the said release and discharge was, is and ought to be deemed and held null and void and of no effect and ought to be so decided and declared and canceled and annulled; that the said Prettyman ought to be ordered and compelled to return and restore to your oratrix the mortgage lien she had and held upon the twelve hundred acres of land described in said Breedlove deed to said Johnson for your oratrix and to the other notes in said deed described, subject however to the deductions of the amount paid by the said Prettyman upon the said indebtedness of said Breedlove and that your oratrix ought in equity and good conscience to have a decree that the said release be cancelled, annulled and treated as never made, that the said Prettyman restore to your oratrix the said notes of said Breedlove so delivered to the said Prettyman, that the said mortgage or trust deed be declared in force and a valid lien upon the premises therein described until the full amount thereof due of principal and interest shall be paid by the said Prettyman, that for the non-payment of interest and principal and taxes as provided in said trust deed the whole balance of said debt *to* be declared to be due for the foreclosure of the said Breedlove mortgage or trust deed and for the sale of the said twelve hundred acres
36 of land therein described or so much thereof as will be sufficient to pay the balance of the said Breedlove debt and interest thereon unless the said sum shall together with all cost be paid by the said Prettyman together with all the cost of this proceeding and all disbursements made by your oratrix for taxes upon said premises described in said McCune deed or which may hereafter be paid by your oratrix to save the said premises or any of them *prior* sale for taxes either past or in future until the said debt shall be paid in full, and that upon such payment being fully made either by sale or by payment by said Prettyman, your oratrix be ordered to deliver up *deliver up* or cancel, the said mortgage or

trust deed of the said McCune or the notes there described. And your oratror and oratrix

And hoped that said Prettyman having now the possession of the whole of said premises would *of* paid or would have offered to or paid said debt in full and thus restored your oratrix to her rights in the premises, but the said defendant Prettyman has ever neglected and refused so to do, but gives out in speeches and pretends that he is not liable or responsible to your oratrix and that she must follow the said McCune and that she your oratrix has no recou-se upon him.

And your orator and oratrix being without remedy at law in the premises therefore prays that the said Benjamin S. Prettyman, Thomas B. Breedlove and Absolom McCune be made parties defendant to this suit, and that they be summoned to appear and answer to the foregoing bill and all the matters and things charged and allegations therein mentioned as fully and positively as if therein specially interrogated, but not upon their respective oaths, their oaths being waived to such answer that upon a final hearing hereof an account be taken of the amount due upon the said Breedlove debt herein described, including interest thereon and deducting the amount paid upon the same by the said Prettyman, also of all taxes paid or hereafter to be paid by your orator and oratrix up to the date of said — and that the said release be declared null and void and cancelled, that the said Prettyman be ordered to produce at said trial the said notes of the said Breedlove or account for their loss, that the contents thereof be proven; and that the said Prettyman be ordered to produce on said trial the original trust deed of said Breedlove herein described and the original lease herein mentioned and the original deeds herein described from said Prettyman and wife to said McCune; and from said McCune and wife to said Prettyman, and that said mortgage or trust deed of said Breedlove to said Johnson for your oratrix herein described be declared and decreed a first lien and mortgage lien upon the said twelve (12) hundred acres of land therein described for the security of principal and interest thereupon due and for the taxes paid by your oratrix for the lands or any part of them in said deed described and that the whole be declared due and payable according to the tenor and effect of said deed, and that the usual decree be made for the sale of said mortgaged premises and for the payment of the amount for principal and interest and taxes aforesaid and costs of this suit by some short day to be fixed by said court, and in default thereof that said premises or so much thereof as may be necessary for the purposes aforesaid be sold by the master in chancery of this court according to the practice of court of equity in such cases; and that the said defendants and each of them and that all persons claiming under them or either of them subsequent to the commencement of this suit and all other persons not parties to this suit who have any liens by judgment or decree upon the mortgaged premises subsequent to the said trust deed of the said Breedlove or any liens or claims thereon by or under any

such subsequent decree or judgment, either purchasers, incumbrances, or otherwise may be barred and foreclosed of all equity of redemption in said premises, and that your orator and oratrix may have such other and further relief as the nature of the case may require and as to this court shall seem agreeable to equity and good conscience *as* your complainant as in duty bound will ever pray.

LYDIA BRADLEY CLARKE,
By E. G. JOHNSON, *Her Solicitor.*

E. G. JOHNSON,
Solicitor for Complainants.

39 STATE OF ILLINOIS, } *ss:*
County of Mason, }

Of the March Term, 1872, of the Circuit Court of said County.

LYDIA BRADLEY
vs.
BENJAMIN S. PRETTYMAN, THOMAS B. Breedlove, & Absolom McCune. } In Chancery to Foreclose.

The Separate Answer of the said Benjamin S. Prettyman, One of the Above Named Defendants.

Saving and reserving &c., for answer to said bill of complaint in said cause above named filed & to so much thereof as he is informed that it is necessary & proper for him to make answer unto severally answering says—He admits that said Tobias S. Bradley died as alleged without children, and that said complainant was appointed administratrix as alleged in said bill, but respondent knows nothing of the payment of the debts of the estate of Bradley, and therefore denies the same is true & respondent denies that by law said complainant is entitled to the personal estate of said Tobias S. Bradley. Respondent admits the marriage of complainant as alleged, but knows not of the residence alleged, & therefore denies the same and calls for proof. This respondent admits that said Thomas B. Breedlove on the 3rd day of June, 1867, was indebted to said Lydia Bradley $19616.25 / 100 dollars as shown in said alleged notes of that date payable to Lydia Bradley with interest at 10 per cent. & payable as alleged. And this respondent — that said Breedlove owned & executed the trust deed or mortgage on the lands in said bill alleged to secure the payment of said notes and sum of $19616.25.

40 And the respondent admits that said Breedlove & wife on the 8th day of October 1867, sold and conveyed the said lands in said mortgage and bill described to this respondent and that said deed was made to this respondent subject to said mortgage to said Johnson, and this respondent avers that said consideration of $24000.00 named in said deed was not pretended but real, and this

respondent denies that he ever agreed to pay off said incumbrance to complainant or otherwise.

This respondent admits that on the 13th day of August 1868, — sold and conveyed the part of said lands alleged to said Absolom McCune for the sum alleged & that the same was acknowledged and recorded as alleged in said bill, but he denies it was for the purpose or with the intention in said bill alleged, or made subject to any incumbrance or trust deed to, or any debt to complainant, and this respondent admits that said Absolom McCune on the 13th day of August, 1868, executed to this respondent for said sum of $8000.00 *dollars*, a sale mortgage on said land named in said deed to him & that said mortgage was filed for record as alleged, & respondent admits that on the 13th day of August 1868, said McCune executed his trust deed or sale mortgage to said E. G. Johnson to secure the sum of $15000.00 *dollars* to said complainant Lydia Bradley in notes described in said bill, and respondent admits that the same — acknowledged and was recorded at the time alleged.

But this respondent denies that he, after the making of said deed or mortgage named or at any time with any intent to cheat or defraud complainant out of any security or otherwise or to obtain the notes of the said Breedlove unfairly or unlawfully or fraudu-
41 lently or craftily or otherwise improperly from said complainant or otherwise or to improperly or wrongfully to release said Breedlove or this respondent from any agreement or liability whatever or wrongfully release all or any part of said land from said mortgage of said Breedlove proposed to complainant or her agents to take the notes of McCune for $15000.00 *dollars* in lieu of the notes & mortgage of said Breedlove & get said release deed named, although this respondent avers that he did before the making of said mortgage from said McCune to said Johnson for the $15000.00 *dollars* named call on the agents of complainants Washington Cockle & the said trustee E. G. Johnson to inquire whether they or complainant would accept the notes and mortgage of said McCune on 600 acres of the land in the Breedlove trust deed or mortgage to said Johnson named in lieu of so much of the debt of said Breedlove to said complainant inasmuch as the same was to become due faster & earlier than the Breedlove debt, said notes of McCune becoming due in one, two & three years from August 13th, 1868, and the said Breedlove debt not being due until 1, 2, 3, 4, & 5 years from June 30, 1867, and this respondent was then informed by said Johnson that the whole matter was left by complainant with said Cockle by him to be determined for her as he thought best under the circumstances and this respondent avers that he then again called on said Cockle, who informed this respondent, that if this respondent would pay him for said complainant the residue of the debt of Thomas R. Breedlove to complainant over and above said $15000.00 *dollars*, he would take the said notes and mortgage of said McCune on said 600 acres of said land in lieu of that sum of $15000.00 *dollars* of the Breedlove debt & have the mortgage or trust deed on all the 1200 acre

tract released and satisfied & this respondent avers that he then
42 agreed to & with the said Cockle for and on behalf of complainant to pay in cash the residue of the Breedlove debt and have the said McCune execute his notes and mortgage to said complainant or for her use on said 600 acres of land & then & there paid to said Cockle in cash the residue of said T. B. Breedlove debt over said $15000.00 *dollars* and by his, said Cockle's, direction took said notes and mortgage of McCune to the office of said E. G. Johnson who then & there in the presence of this respondent carefully examined the same and the receipt from said Cockle for the residue of said debt of Breedlove, paid in cash by this respondent (being as this respondent now recollects over $7000.00 *dollars* in cash) and he, the said Johnson then remarked that he, Johnson would not have agreed to exchange said security & satisfy said trust deed of Breedlove, but as complainant & Cockle had chosen to do so, he would, as directed by them, receive the notes and mortgage of McCune for complainant & release the Breedlove deed of trust on all of the lands therein, conditioned that this respondent would guarantee *that* the title to said 600 acres in the mortgage of McCune to be free from any prior liens or incumbrances thereon & respondent avers that he then and there so guaranteed the same and delivered said notes and mortgage of said McCune to said Johnson for complainant & at the request of the said Johnson & for complainant caused the said mortgage of McCune to said Johnson for said 600 acres of land to be filed for record at the time in said bill alleged & he avers that there was then no prior or other lien on said land so mortgaged by said McCune & this respondent avers that the said Johnson notwithstanding said guarantee aforesaid would not & did not then execute said release, but said he would have said complainant herself to sign the same with him, as she was a woman & with all
43 very careful & particular & personally looked over all her own business. And respondent avers that said release named in said bill was afterwards and long after the date of said release in said bill named sent & delivered to your respondent signed & acknowledged as set forth in said bill and long after the said complainant & all of her agents had had full opportunity to examine said land, inquire into the character & standing of said McCune & in fact long after they had to some extent inquired of & become satisfied as to both and this respondent denies all intent or purpose to mislead, cheat, wrong or defraud complainant or any other person in said transaction and this respondent denies all fraudulent, untruthful and false statements imputed to him in said bill and respondent denies that he represented *that* said 600 acres of land to be the most valuable part thereof, but thinks now it is of equal value with the residue thereof, and respondent denies that he informed any person that the same was cultivated land, although he avers that in fact part of the same was then & is now in cultivation & much more might then have been cultivated & all of the rest might now be put in cultivation & respondent denies that said 600 acres so mortgaged by McCune was the poorest and least valuable

of the 1200 acres & respondent denies that said land mortgaged by said McCune *were* subject to overflow or unfit for agricultural purposes or not worth more than ⅓ to ½ of said mortgage debt named or that all of it was ever wet or low or swampy or was so known by Prettyman & this respondent denies any further or other knowledge of the land or any part of it than was presumed to be & might have been known to said complainant & her agents & which the said Cockle averred that he did know the quality & value of the same when respondent paid him the cash above named.

44 And respondent denies that complainant relied on anything he said in arranging said Breedlove debt but required written guarantee from him for every thing doubtful & delayed the execution of every paper until time could be had to inform herself or for some similar purpose, this respondent denies that he represented said McCune to be a large stock farmer, but avers that he said that McCune claimed he was buying the tract for a stock farm & that he represented that he then had a drove of Texas cattle coming from the southwest & which he expected to drive to & herd the same upon said land & had the appearance of being a fair business man; but he denies that he deceived, misled or deluded said complainant or her agents or that he was or is capable of doing so & avers that said Cockle is & was then the president or some important officer in the First National Bank of Peoria & said Johnson is one of the most able lawyers in Illinois & said complainant has the reputation of being the most capable & efficient woman of business in the State of Illinois, and he positively denies that he ever persuaded or otherwise than in a just & fair business manner induced any of them to sign the release or consent that it should be done.

Respondent admits he took up the Breedlove notes, but avers he paid for them before they became due as aforesaid & that alone induced complainant & her agents to take the money & the McCune notes & mortgage & give him the others. Respondent also admits that complainant accepted said McCune notes & mortgage & avers it was with full knowledge & when she had held them from the 13th to the 28th of August to examine, enquire & deliberate upon & about. Respondent denies that said McCune never occupied

45 or assumed to possess or occupy or control said farm, avers that he did employ persons to fence, break, erect a dwelling, cut hay & dwell thereon for him & until his arrival with his cattle & procured tools, lumber & provisions for persons aforesaid, this — does not know whether said McCune was a citizen of Illinois or not & never averred that he knew, & as to his means, this respondent had no other knowledge than his appearance & representations & that of those who introduced him & recommended him to respondent as a person wishing to purchase said farm, & those persons were farmers known to respondent to be men of good character and means & who had shown said land to said McCune before he came to purchase the same of respondent and this respondent don't personally know said McCune was a farmer or a stock farmer, & denies

he ever represented he did, but he avers that said McCune was represented to him as a stock farmer, feeder and drover, & so represented himself to be & had the appearance of being such a person; respondent don't know the intentions of McCune, but avers he represented to this respondent that he intended improving said land thoroughly and did buy material to do so & employed persons to do it, as this respondent knows & respondent knows the sale was not pretended but in good faith on his part and for all he knows on the part of said McCune that those pretending to know represented then that he, McCune, was the owner of 500 head of cattle then coming across the States of Kansas & Missouri to said farm. Respondent denies any use of said McCune improperly as alleged or otherwise.

This respondent — that *that* about the 30th day of Nov., 1868, said McCune sold and conveyed said land to this respondent and this respondent avers that the following are the causes and circumstances under which said sale to him from McCune was
46 made, the said McCune after making the proposition to improve said land aforesaid left as respondent was informed by him & believes to hurry on his drove of cattle & in or about the last of September or in October of 1868, said McCune returned to Pekin & informed this respondent that he could not get his drove of cattle th-ough the State of Missouri on account of the hostility of the inhabitants or the passage of some law forbidding Texas cattle going through the State & therefore he was compelled to turn back said drove & could not get them through to Illinois that fall, but would get his farming & his business arranged for such business another year, & the agitation of the cattle fever or Texas fever question reaching Illinois soon afterwards, said McCune became disheartened in his business & offered to sell his farm which he deemed very valuable to this respondent & to others, and respondent after the sale of said farm to said McCune having been offered a large sum, viz : $3000.00 *dollars* over what said McCune had paid him, he, respondent, enquired carefully of the standing & ability to pay of the party offering the same to him & was informed that he was a farmer residing in Peoria county, Illinois, and responsible for his offer & said McCune having again offered his farm to this respondent for the notes from him to this respondent & $1000.00 *dollars* advance on said original sale to him, respondent avers he agreed then & there to take the said farm & said McCune procured his wife to execute with himself the deed to respondent for said 600 acres of land in the bill named & respondent gave his note at some 12 months' time to said McCune for $1000.00 & 10 per cent. interest and respondent avers that afterwards said McCune assigned said note to complainant to whom this respondent afterwards paid all of the same then due with the interest amounting to $1000.00
47 & over, having before paid $200.00 *dollars* on said note to one Allison Breedlove.

This respondent denies that he is the sole owner & holder of said 1200 acres of land subject to the mortgage *to* McCune to com-

plainant, but respondent admits said 1200 acres is worth much more than the original debt of Breedlove & avers he paid said Breedlove in purchasing the same of him near $4000.00 *dollars* above any lien of said mortgage of Breedlove to complainant & thought he made a very desirable purchase.

Respondent denies that said land in said mortgage from McCune to Johnson for complainant includes all the poor, wet, swampy & inferior & worthless land & complainant and his counsel either don't know what the facts are *of* which they have stated in their bill or if they do know, they have willfully misstated them in making those allegations, and respondent denies that said release was obtained by false, fraudulent, corrupt or dishonest statements, pretenses or misrepresentations as to value, quantity or security although he avers that 600 acres was only intended to be mortgaged and he avers he represented it to be 600 acres only & the fact was by mistake one 80 acre tract got in said mortgage & was not discovered until afterwards, & it now appears to be 680 acres & 600 acres alone was ever agreed to be given as security & the other 80 the complainant has no equitable right to a mortgage upon whatever & one of the reasons for taking the purchase back from McCune was the discovery by respondent that he had put by mistake and accident in drawing up the papers 680 acres into said deed to McCune when he had in fact sold him but 600, but the 80 acres being included in said mortgage of McCune for complainant is no cause of complaint to complainant & respondent denies all knowledge of wrong or intent to mistreat, defraud or cheat with which he is charged.

48 And this respondent insists upon the force and effect of the statute of frauds and inquiries as to all of the alleged frauds statements & pretenses alleged, concerning said sales or deeds, release & mortgages of said land alleged.

And this respondent herein now again positively denies every allegation in said bill not hereinabove admitted; and, now, having fully answered as to all and singular the allegations of said bill of complaint asks to be hence dismissed with his reasonable costs in this behalf expended.

B. S. PRETTYMAN.

49 STATE OF ILLINOIS, } *ss:*
Mason County, }

I, Geo. A. Blanchard, clerk of the circuit court in and for said county in the State aforesaid, hereby certify that the above is a true copy of the answer of B. S. Prettyman, in the above entitled cause (as near as possible for me to make out from the writing).

Witness, Geo. A. Blanchard, clerk of said court and the seal thereof at Havana, this 27th day of March, A. D. 1872.

[SEAL.] GEO. A. BLANCHARD, *Clerk,*
By H. A. WRIGHT, *Dep'ty.*

50 EXHIBIT B.

STATE OF ILLINOIS, } ss :
Mason County, }

Circuit Court, August Term, A. D. 1879.

LYDIA BRADLEY *vs.* BENJAMIN S. PRETTYMAN, SARAH A. Prettyman, Ansel Haines, Nancy Haines, Absolom McCune, Thomas B. Breedlove, Eliza Breedlove.	In Chancery. For Foreclosure & Relief.

And now on this day comes the complainant, Lydia Bradley, by Johnson and Foster and Dearborn and Campbell, her solicitors, and it appearing to the court herein from the writs issued herein to the sheriffs of the counties of Mason and Tazewell and the returns thereon that the defendants, Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines and Nancy J. Haines had been duly served with process herein at least ten days prior to the first day of the present term of this court and had each appeared and filed their answers in this court to complainant's bill of complaint.

And it further appearing to the court that at the time of the commencement of this suit, from the affidavit of E. G. Johnson, one of the solicitors of the complainant, that the said Absolom McCune was not a resident of this State and that the said complainant under the direction of this court duly published a notice as the law requires in case of non-resident defendants in the Democratic Clarion, a weekly newspaper published in Havana in said Mason county, notifying the said McCune of the pendency of this suit for
51 the time and in the manner provided by law.

And it further appearing to the court that the said defendants Thomas B. Breedlove and Eliza Breedlove had been duly served with process herein for more than ten days prior to the first day of the August term 1879 of this court and the said defendants Absolom McCune, Thomas B. Breedlove and Eliza Breedlove, having been severally three times solemnly called in open court to plead, answer or demur to the complainant's bill of complaint, came not; but herein made default;

It is therefore ordered, adjudged and decreed that the same be taken for confessed against the said defendants, Absolom McCune, Thomas B. Breedlove and Eliza Breedlove.

And the court having ordered this cause to be referred to the master in chancery of this court to take proofs, & also by agreement of the solicitors of the complainants and defendants and that Frank Ives, a notary public, should take and report certain other proofs now on file in this cause, and that Watson, a short hand reporter,

should take and report the testimony of Allison Breedlove, Thomas Breedlove, Marshall Landers, Pardon Case and Wright Wyatt, now on file in this case, and the said master in chancery of this court, as well as the said Watson and the said Ives, having reported the same, and the said cause coming on for hearing upon the original and amended bills of complaint and the answers and amended answers of the defendants Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines, Nancy J. Haines and the replication of the complainant and default of the other defendants, and, the court being fully advised in the premises, doth find:

52 That the court has jurisdiction of the subject matter and the parties in this cause, and that there is now due from the defendant Absolom McCune, to the complainant, Lydia Bradley, the sum of thirty one thousand and five hundred dollars for principal and interest on the three certain promissory notes mentioned in complainant's bill, each for the sum of five thousand dollars and due and payable in one, two and three years from date with interest at ten per cent. per annum from the thirteenth day of August A. D. 1868, and secured by a deed of trust to one E. G. Johnson of the same date on the following described lands in said trust deed mentioned, to-wit:

The north east quarter; and the north east quarter of the south east quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of the north half of section twenty-six (26), all in township twenty-three (23) north, of range six (6) west of the 3rd principal meridian in said Mason county.

It is further ordered, adjudged and decreed by the court that the title to the said lands, so far as the said McCune mortgage is concerned is in fee in the said Absolom McCune, free and clear of any claim in law or equity of the said Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines, Nancy J. Haines, Thomas B. Breedlove and Eliza Breedlove and subject to the payment of the said amount due from the said McCune to the said complainant.

And it further appearing to the court that the amount now due from the said Absolom McCune to the said complainant was

53 for the purchase money of the aforesaid lands;

It is therefore ordered, adjudged and decreed that the purchaser under the said sale (unless the amount shall be paid without sale) take the said lands free and clear of all right of dower of the wife of the said Absolom McCune or the wives of either of the said defendants.

It is further ordered, adjudged and decreed by the court, that the defendant pay to the complainant, within thirty days from this date the said sum of thirty-one thousand five hundred dollars, with lawful interest to be computed thereon, from this date until paid, and also the costs of this suit, to be taxed by the clerk of this court.

And it is further ordered, adjudged and decreed that in default of said payment being made as aforesaid, by the defendant, then, and in that case, the said mortgaged premises mentioned in the bill of complaint in this cause, to-wit:

The north east quarter, and the north east quarter of the south east quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of the north half of section twenty-six (26); all in township twenty-three (23) north of range six (6) west of the 3rd principal meridian in said Mason county, or so much thereof as may be sufficient to realize the amount so due the complainant, principal and interest and also the costs of this suit, including the fees, disbursement- and commissions on the sale herein mentioned, and which may be sold separately without material injury to the parties interested, be sold at public vendue for cash in hand to the highest and best bidder, at the front door of the court house in the said county of Mason, that the master in chancery
54 of this court execute this decree; and that he give public notice of the time and place of said sale, by previously publishing the same for the space of thirty days in a newspaper published in said county; and that the complainant, or any one of the parties in this cause, may become the purchaser or purchasers; that the said master, on such sale being made execute a certificate of purchase to each purchaser or purchasers thereof, or any portion thereof; which certificate shall specify the lands or tenements purchased by such purchaser or purchasers, and the sum paid therefor, or, if purchased by the complainant in said bill, the amount of his bid, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed according to law, and the said master shall also file, in the office of the recorder of said county, a duplicate of such certificate or certificates signed by him.

And the said master, out of the proceeds of such sale, shall retain his fees, disbursements and commissions on said sale; that he pay the officers of this court their costs in this suit; and that out of the remainder of said proceeds he pay to the complainant the said sum of thirty-one thousand five hundred dollars, together with legal interest thereon, from the date of this decree, to the day of sale; or, if such remainder shall be insufficient to pay the whole of said amount and interest, as aforesaid then that he apply said remainder to the extent to which it may reach in satisfaction of said amount and interest; and that the said master take receipts from the respective parties to whom he may have made payments as aforesaid, and file the same, together with his report of sale, in this
55 court, and that, in case the said premises shall sell for more than sufficient to pay the principal, interest and costs in this suit, then that the said master, after making payment as aforesaid bring such surplus moneys into court without delay to abide the further order thereof.

And it is further ordered, adjudged and decreed that the defendants and all persons claiming by, through or under them since the commencement of this suit, be forever barred and foreclosed from all equity of redemption, and claim of, in and to said mortgaged premises or any part thereof, and if the same are not redeemed, according to law, by the defendants, their heirs, executors,

administrators or grantees, within twelve months next after the day of such sale, and by all judgment creditors, within fifteen months next after the day of said sale; and that at the expiration of said fifteen months next after the day of said sale, if said mortgaged premises, or any portion thereof, are not redeemed as aforesaid, then, in that case upon the production to the then acting master in chancery, and filing in his office of the certificate of purchase executed by the master in chancery as aforesaid, to the purchaser or purchasers of said mortgaged premises, or any portion thereof, by such purchaser or purchasers his or their representatives or assigns, said master shall make, execute and deliver to such purchaser or purchasers, or to his or their representatives or assigns, good and sufficient conveyance or conveyances, in fee simple of said premises, or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

56 And it is further ordered, adjudged and decreed, that upon the execution and delivery of the conveyance or conveyances as aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into possession of the portion of said mortgaged premises so conveyed to him or them; and that any of the parties in this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession, under them or either of them, on the production of the master's deed of conveyance, and a certified copy of the order of this court, confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their representatives or assigns, and on refusal so to do, will be considered in contempt of this court.

And it is further ordered, adjudged and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendant, Absolom McCune, who is personally liable for the payment of the debt secured by said mortgage remain liable to pay to the complainant the amount of the balance remaining due on said mortgage.

LYMAN LACEY, *Judge.*

Filed Aug. 22nd, 1879.

LEONARD SCHWENK, *Clerk.*

57 STATE OF ILLINOIS, } *ss:*
Mason County, }

I, Wm. M. Duffy, clerk of the circuit court and *ex officio* recorder of Mason county, in the State aforesaid, and keeper of the seal, records and files of said court and office, do hereby certify the above and foregoing to be a true, perfect and complete copy of a "decree" rendered at the August term A. D. 1879, of the said Mason county

circuit court, on the 17th day of said term (it being August 22nd, 1879) in a certain cause then pending in said court on the chancery side thereof, wherein Lydia Bradley was complainant and Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines, Nancy J. Haines, Absalom McCune, Thomas B. Breedlove and Eliza Breedlove were defendants, as the same appears from the records and files of said court now in my office remaining.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Havana, Illinois, this twelfth day of August, A. D. 1895.

WM. M. DUFFY,
Clerk of the Circuit Court and ex-Officio Recorder Aforesaid.

[SEAL.]

Fee $3.50 paid 8/17/95.

WM. M. DUFFY, *Clerk.*

58 EXHIBIT C.

STATE OF ILLINOIS:

Supreme Court.

At a supreme court begun and held for the State of Illinois, at Springfield, on the first Tuesday in October, A. D. 1900.

Present: Carroll C. Boggs, chief justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; James H. Cartwright, justice; John P. Hand, justice; Jacob W. Wilkin, justice.

To-wit on the 19th day of October, A. D. 1900, there was filed in the office of the clerk of said court an opinion of said court, in the words and figures following:

59 R. H. dock. 63.—Ag. 109.—Cent. div., June, 1900.

H. W. LIGHTCAP }
v.
LYDIA BRADLEY. }

Mr. Justice CARTWRIGHT delivered the opinion of the court.

Five ejectment suits were commenced by the appellant H. W. Lightcap, in the circuit court of Mason county, on July 13, 1895 against tenants of the appellee, Lydia Bradley. The venue in all the cases was changed, on motion of the defendants, to Fulton county, and appellee was afterwards substituted as defendant in each of said cases. The suits were consolidated in the circuit court of Fulton county, by agreement of the parties, under the title of H. W. Lightcap *v.* Lydia Bradley. A jury was waived and the cause was tried by the court. There was a finding of not guilty, and the

court, after overruling a motion for a new trial, entered judgment against the plaintiff for costs, and this appeal followed.

In the consolidated action the plaintiff claimed title in fee simple to the north east quarter and the north east quarter of the south east quarter of section 22, the south half of section 23, and the north half of the north half of section 26, all in township 23, north, range 6 in Mason county. The defendant pleaded not guilty. At the trial it was stipulated that Benjamin S. Prettyman on October 8, 1867, was the owner of the land in controversy in fee simple, by title deducible of record from the United States and that he was the common source of the titles claimed by the respective parties. The plaintiff, to maintain the issues on his part proved a conveyance of said lands from Prettyman and wife, dated August 13, 1868, to Absalom McCune, a deed from said Absalom McCune and wife to said Benjamin S. Prettyman of the same lands, dated November 30, 1868, and a quit claim deed thereof from Benjamin S. Prettyman to plaintiff, dated September 4, 1893, all of which deeds were duly acknowledged and recorded. The defendant, to maintain the issues on her part, made proof of a trust deed from said Absalom McCune, dated August 13, 1868, conveying said lands to E. G. Johnson as trustee, to secure the payment of three promissory notes aggregating $15,000, drawing ten per cent. interest and payable to the defendant, Lydia Bradley.

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The defendant claimed title through the trust deed and the following facts established by the evidence: In March, 1872, the defendant by said E. G. Johnson, her solicitor, the trustee named in the trust deed, filed a bill in the circuit court of Mason county against said Absalom McCune, Benjamin S. Prettyman and others to foreclose the same. At the August term, 1879, of said court a decree of foreclosure was entered in that suit, in which the court found that there was due from said Absalom McCune on the promissory notes $31,500 and ordered that in default of the payment of that sum with interest and costs, within thirty days, the lands should be sold by the master in chancery of said court; that the master, on making such sale, should execute a certificate of purchase to the purchaser, specifying the lands purchased and the time when the purchaser would be entitled to a deed unless redemption should be made according to law; that the defendant should be forever barred and foreclosed from all equities of redemption if the premises were not redeemed according to law; that at the expiration of fifteen months next after the day of sale, if the premises should not be redeemed the master should make a deed to the holder of the certificate that upon the execution of such deed the grantee therein should be let into the possession of the premises, and that Absalom McCune should remain liable for the payment of any deficiency. In pursuance of said decree the master sold the premises to the defendant for $10,000 on October 27, 1879, and executed a certificate of purchase to her as directed by the decree. The master reported the sale to the court, and his report was approved and the sale confirmed on

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November 23, 1879. The lands were wild lands and unoccupied, and about two months after the sale John Coddington went into possession of them as tenant of the defendant. This was about January 1, 1880, and defendant has been in actual possession, by her tenants, since that time until the commencement of the suit. The lands were not redeemed and no deed was ever made to her on her certificate of purchase. She paid all the taxes on the land from the year 1884 to 1893, inclusive. The trustee, E. G. Johnson, died intestate in 1885. In the spring of 1894 the defendant made application to the widow and heirs of said trustee to sell the premises under the power conferred on the trustee by the trust deed. The sale was made by said widow and heirs and the defendant bid for the premises $35,000. On June 11, 1894, said widow and heirs of the trustee executed a quit claim deed to the defendant, reciting the trust deed and the sale made by them, and purporting to convey to the defendant all the title of Absalom McCune at the time of the execution of the trust deed and the title thereby conveyed by him to said trustee.

Only legal titles can be considered in this action and the plaintiff must recover upon the strength of his own title. He proved a connected title in fee simple to the premises deducible of record from the United States, and made out a *prima facie* case entitling him to recover unless some better title was proved by the defendant. More than fourteen years had elapsed from the date when the redemption expired under the master's sale, and the defendant had never obtained a deed on her certificate of purchase, but had failed and neglected to take out such deed. Section 30 of chapter 77 of the
62 Revised Statutes provides, that when the premises mentioned in any certificate of purchase shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years after the expiration of the period of redemption, and when a deed is not taken within such five years the certificate shall be null and void. It is not denied that the certificate of purchase became null and void under this statute, but defendant relied upon four defenses, which it is claimed she established by the evidence. First, under section 6 of chapter 83 of the Revised Statutes, in regard to limitations, that the trust deed from McCune to Johnson, the decree of sale and certificate of purchase constituted color of title, which, coupled with her possession and payment of taxes for seven successive years, made her the legal owner of the lands to the extent and according to the purport of her paper title; second under section 4 of the same act, that her possession and actual residence, through her tenants, for seven successive years, having a connected title in law or equity deducible of record from the United States, by virtue of the same trust deed, decree and sale, barred the action of plaintiff; third, that she had the paramount legal title under the deed from the widow and heirs of Johnson, the trustee; fourth, that she was mortgagee in possession after condition broken and entitled to possession as such.

63 These defenses all rest upon the trust deed and the subsequent proceedings under it, and are so connected that the principles applicable to one are largely controlling as to the others. To make out the first defense claimed, it is essential for the party claiming the benefit of the limitation to prove a paper title which on its face at least purports to convey a title. To establish such a paper title, it appears to be first insisted that the trust deed was a conveyance of the fee to Johnson, with only the equitable right on the part of the mortgagor to redeem; that upon default, the fee simple title at law was in the trustee, and that such title remained in him unaffected by the decree of foreclosure and sale and notwithstanding the sale to defendant and that defendant held possession under that title. Leaving out of consideration the effect of a mortgage in the statutory form, it is true that a mortgage or trust deed like the one in question here, which purports to convey title, does, as between the mortgagor and mortgagee, convey such title but it is only a qualified conveyance of the land, and the mortgagor parts with the title only as security to his creditor and during the existence of his debt or obligation. In the developement of the law of real estate mortgages in England the mortgage was at first a pledge of land, usually requiring a judgment to complete the transfer of title to and vest it in the mortgagee. Afterward, a form of mortgage came into use which vested title of itself, and the pledge changed into an estate in fee without judicial foreclosure upon the mortgagor's default. This mortgage vested absolute title in the mortgagee upon condition broken. Courts of equity, however, recognizing the purpose of the mortgage as merely a pledge to secure a debt, established a right of the mortgagor to redeem. They created a new estate in the form of the equity of redemption and a remedy for the creditor to cut off this estate. A proceeding was devised to extinguish the mortgagor's right to redeem and to vest title in the mortgagee, and this was the proceeding now known as strict foreclosure. (9) Ency. of Pl. & Pr. 118.) Equity assumed jurisdiction to relieve the mortgagor against a forfeiture upon default, and he was relieved from it on payment of the
64 debt. (1 Jones on Mortgages, sec. 8.) Courts of law, following the lead of courts of equity, have adopted many equitable principles as to the titles of the respective parties, and at law the title of the mortgagee can be used only for the purpose of *securing his equitable rights under it.* "As to all persons *except the mortgagee* and those claiming under him, it is everywhere the established modern doctrine that a mortgagor in possession is at law both before and after breach of the condition, the legal owner." (1 Jones on Mortgages, sec. 11.) In many of the States a mortgage confers no title or estate upon the mortgagee, and it is nothing but a mere security for a debt or obligation. This State has adhered to the rule that at law a title vests in the mortgagee, but only for the protection of his interests. For the purpose of *protecting and enforcing his security the mortgagee* may enter and hold possession by virtue of his title and take the rents and profits in payment of his mortgage debt. He may main-

tain the possessory action of ejectment on the strength of such title, but the purpose and effect of the action are not to establish or confirm title in him, but, on the contrary, to give him the rents and profits which undermine and destroy his title. (United States Mortgage Co. *v.* Gross, 93 Ill., 483.) When the rents and profits have paid the mortgage debt, both the title and right of possession of the mortgagee are at an end. The mortgagor's interest in the land may be sold upon execution / his widow is entitled to dower in it / it passes as real estate by devise; it descends to his heirs by death as real estate; he is a freeholder by virtue of it; he may maintain an action for the land against a stranger and the mortgage cannot be set up as a defense. The mortgagee has no such estate as can be sold on execution; his widow has no right to dower in it; upon his death the mortgage passes to his personal representatives as personal estate, and it passes by his will as personal property. (1 Jones on Mortgages, sec. 15.) The title of the mortgagee, even after condition broken, is not an outstanding title of which a *stranger* can take advantage, but it is available only to the *mortgagee* or one claiming under him. (Hall *v.* Lance, 25 Ill. 277.) The mortgagor may sell and convey his title or mortgage it to successive
65 mortgagees, and his grantee or mortgagee will succeed to his estate and occupy his position subject to the encumbrance.

Fitch *v.* Pinckard, 4 Scam. 69, was an action of ejectment, and there was a question whether an equity of redemption was liable to execution and would pass to the purchaser at an execution sale. The court, holding that it would pass, said that the earliest doctrine in England settled that the whole legal estate was in the mortgagee, but that the strictness of the law has yielded to the principle of justice and equity, and the doctrine held in the United States in regard to the estate of the mortgagor is, that he is to be treated as the real owner of the estate for all beneficial purposes, subject only to the rights and encumbrance of the mortgagee.

Cottingham *v.* Springer, 88 Ill. 90, was also an action of ejectment, where the same question arose. The court cited Fitch *v.* Pinckard, *supra*, and reiterated what was there said. After referring to the common law rule that the mortgagee held the legal title in fee and that the mere equitable right of the mortgagor could not be sold on execution, the court said (p. 93): "But many of the States—and ours of the number—have by enactment made great modifications of the rule. Our legislature at an early day provided that when the mortgagor paid and satisfied the debt and the mortgage had been recorded, he might compel the mortgagee to enter a satisfaction of the mortgage on the margin of the record, which should operate as a discharge and release of the same and forever bar all actions that might be brought thereon. This provision is found in the act establishing the recorder's office, (Pub. Laws of 1819, p. 19, sec. 5,) and has been continued in force ever since. This was a most material modification of the common law rule, as it re-invested the mortgagor with the title simply by the mortgagee stating over his signature, on the margin of the record, that he had received satisfaction of the

debt, and dispensing with a release or re-conveyance for the purpose." The court also said that the provision for a foreclosure at law by a *scire facias* and a sale of the property under an exe-
66 cution at law recognized the equity of the redemption as an interest or title that might be sold on execution, subject to the same incidents that other sales of real estate are under when sold under ordinary executions at law.

In Barrett *v.* Hincley, 124 Ill. 32, which was an action of ejectment by Hincley against Barrett and others, the court held that the title of a mortgagee exists only for the benefit of the *holder of the mortgage indebtedness*, and can only be asserted by an action in *furtherance of his interest* as a means of coercing the payment of the debt; that if a mortgagee conveys the mortgaged premises without assigning the debt, the grantee will hold the legal title in trust for the holder of the debt, and that the mortgage interest, as distinct from the debt, has no determinate value and is no fit subject for assignment. The court also said, (p. 46): "It must not be concluded from what we have said that the dual system respecting mortgages, as above explained, exists in this State precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this State, as in others, material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law, that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons *except the mortgagee or his assigns.* (Hall *v.* Lance, 25 Ill., 250; Emory *v.* Keighan, 88 *id.*, 482.) As a result of this doctrine, it follows that an ejectment by the mortgagor against a third party the defendant cannot defeat the action by showing an outstanding title in the mortgagee. (Hall *v.* Lance, *supra.*) So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. (Pollock *v.* Maison, 41 Ill. 516; Harris *v.* Mills, 28 *id.* 44; Gibson *v.* Rees, 50 *id.* 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing and the mortgage an incident."

67 The mortgagee is the legal owner for only one purpose, while, at the same time, the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous and exists only between him and the mortgagor and for a limited purpose. Delano *v.* Bennitt, 90 Ill. 533, was an action of ejectment. E. T. Warren, the owner of two-fifths of the land in controversy, mortgaged the same to the Kennebeck Bank of Maine. The bank conveyed said two-fifths to Benjamin Wales and others, and Delano claimed the same through mesne conveyances from the grantees of the bank. It was held that the deed from the bank purporting to convey this two-fifths interest did not convey anything, and the court said (p. 536): "The mortgage is

deemed a mere incident to the mortgage debt, and the conveyance of the interest of the mortgagee in the land without an assignment of the debt is considered in law as a nullity." The title is never out of the mortgagor, *except as between him and the mortgagee* and as an incident of the mortgage debt, for the purpose of obtaining satisfaction. When the debt is barred by the statute of limitations the title of the mortgagee or trustee ceases at law as well as in equity. When the debt, the principal thing, is gone, the incident, the mortgage, is also gone. (Pollock *v.* Maison, 41 Ill. 516.) The mortgagor's title is then freed from the title of the mortgagee, and he is the owner of the premises, not by any new title, but by the title which he always had. Statutes of limitations do not transfer title from one to another, and a statute of limitations which would have the effect of transferring the legal title back from the mortgagee to the mortgagor would be unconstitutional. (Newland *v.* Marsh, 19 Ill. 376.) The title of the mortgagor becomes perfect because the title of the mortgagee is measured by the existence of the mortgage debt or obligation and terminates with it. Barrett *v.* Hinckley, *supra.*

According to these well established rules of law Benjamin S. Prettyman was the owner of the premises in question when the notes secured by the trust deed became due, except as against the title held by the trustee for the purpose of enforcing pay-
68 ment of said notes. The defendant, Lydia Bradley, had different methods open to her for the enforcement of her rights, and the collection of her debt. The trustee might have taken possession of the premises for the purpose of applying the rents and profits, if there were any toward the satisfaction of the notes. The defendant might elect to foreclose under the power conferred by the trust deed, or, if the circumstances justified it, she might have had a strict foreclosure in a court of equity. Such a foreclosure is, in fact, a proceeding to foreclose the equity of redemption, and it is the only vestige of the former common law foreclosure remaining in our law. It is only in use to a very limited extent, and is not permitted except under extraordinary circumstances. Another method, and the one which she chose to pursue, was the proceeding by foreclosure and sale in a court of equity, which is a proceeding to collect a debt and enforce the security through the powers of such court. What the effect would have
69 been if she had pursued some other remedy is not material, as she did not pursue or attempt to pursue any other, but made her election to invoke the powers of a court of equity and the statutes of the State. She submitted to have her rights fixed by them and not enforced through the powers conferred upon the trustee by the trust deed. She did not take possession under the mortgage, but took possession as purchaser under the sale made by the court. A decree was entered in pursuance of the prayer of her bill, ordering a sale of the premises, which was duly made and she became the purchaser. Having made her election and secured a valid sale of the property, she must abide by it. (State Bank *v.*

Wilson, 4 Gilm. 57.) The cause of action was merged in that foreclosure and sale, and all the rights and liabilities growing out of the trust deed were transferred to the decree. When a mortgage is foreclosed by suit the decree of the court becomes the basis of title. (United States Mortgage Co. *v.* Gross, *supra.*) By the decree, and the execution thereof, the legal liability was transferred to the decree. The debt was merged in the decree, and the rights and liabilities growing out of the trust deed were fixed by such decree and to be enforced through its provisions. Wayman *v.* Cochrane, 35 Ill. 151.

It is insisted by counsel that the title conveyed to Johnson could not merge in the decree; and perhaps the doctrine of merger does not strictly apply, but the title which Johnson had was only available for the collection of the notes, and they were merged in the decree. The defendant had asked and obtained a decree for the enforcement of her rights in another manner and by another means. Whether the doctrine of merger applies or not, the sale of the premise- under the decree exhausted all the rights and remedies under the trust deed, and the title which had been in the trustee was sold by the court. (Kelgour *v.* Wood, 64 Ill. 345; Walker *v.* Warner, 179 *id.* 16.) In Seligman *v.* Laubheimer, 58 Ill. 124, the court said (p. 126): "Whether determining the legal effect of the mere foreclosure, we do hold
that the decree, followed by a sale of the premises, the
70 purchase, and the subsequent acts of the first mortgagee, extinguished his mortgage lien. * * * Plaintiff in error obtained his decree, caused a sale, became the purchaser, received his certificate of purchase, and then procured an award for a special execution to make the residue of his debt. By these acts the mortgage lien was extinguished. The intention to merge the lien is clearly deducible from them." In Ogle *v.* Koerner, 140 Ill. 170, the court said (p. 179): A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien and when the lien has been enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it." In Davis *v.* Dale, 150 Ill. 239, the law was again stated, as follows (p. 243): "By virtue of the lien created, the mortgagee or *cestui que trust* had the right to have the security foreclosed and the property sold and the proceeds applied in payment of the secured debt. But when this has been done, and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force and the property is no longer subject to its provisions. (Ogle *v.* Koerner, 140 Ill. 170; Seligman *v.* Laubheimer, 58 *id.* 124.) Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust* or not. By becom-

ing the purchaser a new relation created by the statute exists, in no wise dependent upon the privity of the contract between the purchaser and mortgagor." The effect of the sale could not be otherwise. To hold that the mortgage remains in force would be to abrogate the statute, which would be of no practical effect if the failure to take a deed leaves the mortgage still in force. It is absurd to say that a mortgagee, by neglecting or refusing to take a deed until the expiration of five years, can thereby
71 re-instate himself in the same position as before the purchase.

The land being freed from the lien of the trust deed by the sale, the title of the trustee, Johnson, was gone, and the only interest of defendant was by virtue of the certificate of purchase. The sale of premises under a decree of foreclosure, where the decree does not expressly save any right to resort to the land again, is an absolute discharge of the premises from the lien. In the absence of a provision for another sale the premises will be discharged, even from unmatured portions of the debt. (Rains *v.* Mann, 68 Ill., 264.) Such sale is a sale of the land and of all interests, both that which the mortgagor had at the execution of the mortgage and the interest of the mortgagee and other parties to the suit. It is made by the court as vendor, and a sale discharges the land from the lien and transforms it into the statutory lien by the certificate of purchase. (Smith *v.* Smith, 32 Ill., 198.) It is true, that if the premises are redeemed by the mortgagor they become like any other property owned by him and may be subject to execution and sale for a deficiency; but that is because they belong to the debtor, and not on account of any lien by virtue of the mortgage. A redemption by any person not liable for the debt would free them absolutely, so that they could not even be levied upon by execution for a deficiency.

The case most relied upon by counsel as holding that the foreclosure and sale left the title in Johnson unaffected, is Williams *v.* Brunton, 3 Gilm., 600. In that case there had been no sale. It was an action of ejectment by Williams against Brunton. Walker, a former owner of the premises, had mortgaged them to King and afterward conveyed them to Brunton. The plaintiff, Williams, claimed title from an independent source. King obtained a judgment by *scire facias* on his mortgage, but no sale had been made. There was a judgment in favor of Williams against Brunton in the ejectment suit by default. This judgment was set aside and King was let in to defend in the name of Brunton and himself, claiming under his mortgage and the judgment foreclosing it. The
72 question in this court was whether King sustained such relation to Brunton that he had a right to defend. It was insisted on behalf of Williams that if there was privity between King and Brunton while the mortgage was in force, the mortgage was extinguished by the foreclosure and the privity thereby ceased. On the other hand, it was argued that by a mere judgment without sale or deed no new estate was created or invested in the mortgagee, and that the judgment did not disturb or drown the lien or the estate created by the mortgage on the principle of merger. The court

held that King was properly allowed to defend, and said that a judgment or decree, and subsequent purchase, was connected with and consistent with the first title and in aid of it. The very case cited upon which the decision of the court rested, (Den *v.* Stockton, 7 Halst. 322,) decided that a sale does divest or suspend the legal estate or right of possession of the mortgagee. A judgment on the *scire facias* itself had created no new lien, but was merely a means of making available the lien created by the mortgage. The court said that a subsequent title obtained by a sale is clearly consistent with the first and connected with and in aid of the original title.

There is no dispute of the proposition that a purchaser at a mortgage sale may deraign title through a mortgage. The title of the purchaser relates back to the execution of the mortgage, and it may be shown as a basis for the foreclosure and sale. (Kruse *v.* Scripps, 11 Ill. 98.) After the sale no one has any further interest in the premises except the mortgagor and the purchaser, although the mortgage is one of the links in the chain of title. The trust deed of Johnson, after the foreclosure and sale, did not constitute color of title so as to enable defendant to avail herself of the statute of limitations.

Defendant took and held possession under her certificate of purchase, but the paper title relied upon under the statute of limitations must apparently transfer title to the holder. (Shakleford *v.* Bailey 35 Ill. 387; Dickenson, *v.* Breeden, 30 *id.* 279; Bride *v.* Watt, 23 *id.* 507; Rigor *v.* Frye, 62 *id.* 507.) A certificate of purchase does not purport to convey title, but on its face shows the con-
73 trary, by stating the amount of the bid and when the holder will be entitled to title if the premises are not redeemed. A purchaser is not entitled to possession by showing that he bid off the land at a sale. (Johnson *v.* Baker, 38 Ill. 98.) The purchaser of land under an execution of the foreclosure of a mortgage has no legal title, or right to be invested with a legal title, until the time allowed for redemption has expired. (Rockwell *v.* Servant, 63 Ill. 424.) The certificate of purchase confers on the holder no title in the land. (Huftalin *v.* Misner, 70 Ill. 55.) In Hays *v.* Cassell, 70 Ill. 669, it was said (p. 672): "The certificate of purchase conveyed no title to the purchaser, nor did it disturb the possession of the defendant. That still contined in him, and would so remain until fifteen months had elapsed and his title transferred by the sheriff's deed." A court has no power to award possession to a purchaser before the expiration of the period of redemption, and such purchaser is not entitled to possession before the execution of a master's deed to him. The certificate of purchase only entitles him to receive the legal title at a future time, upon a certain condition, and a decree is erroneous and will be reversed which awards possession before that time. (Bennett *v.* Matson, 41 Ill. 332; Myers *v.* Manny, 63 *id.* 211.) No contract was proved by which the defendant became entitled to the possession when she took such possession about two months after the sale, and she was a trespasser in doing so. It is true that a mortgage-, in case the rents and profits are pledged as

security, may, under some circumstances, have a receiver appointed to apply them upon any deficiency; but this is only done upon equitable grounds and by a court of equity. The appointment of a receiver is an equitable remedy, and, in effect, an equitable execution. (2 Jones on Mortgages, 1516.) Neither the mortgagee nor the purchaser has a right to possession, but the appointment of a receiver is a power which a court of equity will exercise to prevent palpable wrong and injustice. (Haas *v.* Chicago Building Society, 89 Ill. 498.) The certificate of purchase did not at any time purport to convey title or give defendant any right to the posses-
74 sion, and could not be made a basis of title under section 6 of the limitation act. She showed no right under that section.

The second claim, under section 4 of the limitation act, is even less tenable than the other. Under that section something more than mere color of title is required. The title must be such as is *prima facie* good, and such as courts will enforce unless rebutted or destroyed by evidence of a better title. (Moore *v.* Brown, 52 U. S. 414.) Inasmuch as the land had been freed by the sale from the lien of the trust deed, and the certificate of purchase did not pass title but was only an inchoate right to a title upon a certain condition, the defendant showed no title under section 4.

The third alleged defense is made under the deed of the widow and heirs of Johnson, the deceased trustee. We have already disposed of the question whether any title remained in the trustee after the defendant made her election and caused the premises and the titles of all parties to be sold and the land to be discharged of the lien. There is a question, however, raised from the fact that Johnson, the trustee, was not a party to the record in the foreclosure suit. He was the defendant's solicitor and legal adviser in the foreclosure proceedings. The suit was brought through his instrumentality and was prosecuted through him and under his direction, as solicitor for the defendant. He had no interest to be effected, but merely held the title of a trustee for the purpose of enabling the defendant to obtain payment through the exercise by him of powers conferred by the trust deed. The bill which he filed asked the court for a foreclosure instead of the exercise of such powers, and he obtained a decree which relieved him from any further responsibility or the exercise of any such powers. Where a suit is advised, directed and prosecuted by a party in that manner, although he is not a party to the record, he is bound by the decree. (Freeman on Judgments, sec. 174; Cole *v.* Favorite, 69 Ill. 457; Bennitt *v.* Wilmington Star Mining Co. 119 *id.* 9.) The deed from the widow and heirs was void and conveyed no title.

75 The last proposition relied upon in support of the judgment is, that defendant was in possession as mortgagee after condition was broken. What has been said with reference to the continuance of the trust deed, and the title thereby conveyed, after the sale, applies with equal force to this claim. When the premises were sold a new relation was created, fixed by the terms of the statute. The trustee never was in possession, and when defendant took possession

she had asked the court to enforce, and the court had enforced, her rights through its own powers, as governed by the statutes of the State. The relation created by the statute upon the sale of the premises was the only remaining relation between the parties. As against the purchaser the mortgagor had only a right to redeem from the sale, and it is argued that because there was no redemption the title of the mortgagor was absolutely gone, and therefore he could never afterward assert title under any circumstances.

As we have seen under repeated decisions, the premises are discharged of the lien of the mortgage and the obligation is transformed into the new lien. Necessarily, the title is in the mortgagor subject only to that lien, and while, as against it, he has nothing but a right of redemption, as against all the rest of the world he is the owner. He has the right of possession, and his estate is alienable and devisable as before. After twelve months his creditors may redeem, and an execution against his lands and tenements is levied, in such case,
upon the land. If at a sale it brings more than the charges
76 against it, he is entitled to the surplus as arising out of his
property and estate. The certificate of purchase does not transfer title but only assures to the purchaser a conveyance of the legal title if the premises are not redeemed. If the certificate of purchase becomes null and void by virtue of the statute of limitations, or otherwise, so that the premises are freed from the lien, the mortgagor is then the absolute owner. The lien of the mortgage and the title of the mortgagee ceases by operation of law when the debt or obligation is barred by the statute of limitations. (Barrett *v.* Hincley, *supra.*) And there is no difference, in principle, where the limitation runs against the new lien in the form of a certificate of purchase.

In Stephens *v.* Illinois Mutual Ins. Co. 43 Ill. 327, the question being whether a mortgagor had any insurable interest in mortgaged premises after a decree of foreclosure and sale, it was held that he had, and the court said (p. 331.) "His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this State the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening encumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits." The mortgagor still has the estate of a mortgagor, but the amount and time of redemption have become absolutely fixed by the decree of sale. (2 Jones on Mortgages, sec. 1661.) *After the expiration of the period of redemption the title of the mortgagor would be absolutely gone, in the sense that the purchaser had become absolutely entitled to a conveyance of it, and in this sense it has often been said that his title is gone, but it is never actually out of him until a conveyance is made.* The purchaser can-

not oust him from possession or call for an account of rents and profits without a deed, and the certificate of purchase could never change from a lien into a title to the land until a deed is
77 made. The mortgagor's right is gone if the purchaser complies with the statute and avails himself of the right to a conveyance of the title. By the decree and by the statute *of* the title of the mortgagor and those claiming under him would only be divested and the legal title vested in defendant upon the execution of a deed to her. At the expiration of fifteen months from the day of sale she became entitled to such a deed conveying to her the legal title, but she never obtained it. Whether she could have successfully defended an action of ejectment during the five years after the expiration of the period of redemption, on the ground that, although she did not have the legal title, she was entitled to a conveyance of it, is not material. Whether her right to a deed would have been a defense is not involved here, because she lost that right absolutely, at the expiration of five years, and from that time forward had no further interest in the premises. She could have no other or different right under her purchase than any other purchaser. If some other person had purchased the premises, no one would say that such purchaser acquired any right except under the certificate of purchase, and it cannot be that the mortgagee acquires any other or different or better title than any other purchaser. It would be destructive of the fairness and equality of such sales that the mortgagee should acquire a better title or should have any advantages as bidder over any other person.

Before the enactment of the statute rendering a certificate of purchase null and void at the expiration of five years, this court had fixed a limitation which it deemed equitable in Rucker *v.* Dooley, 49, Ill. 377, and when the legislature, acting within their unquestioned powers, changed the rule by this statute, it was upheld as valid in Ryhiner *v.* Frank, 105 Ill. 326. The effect of the statute has been several times considered, and it is no longer an open question. In Seeberger *v.* Weinberg, 151 Ill. 369, the court, after referring to the statutes, said (p. 380): "If, then, it be assumed, as seems most probable, that Seeberger failed to obtain a master's deed, his right to obtain such deed is barred by limitation and his certificate of purchase has
78 ceased to be of any validity. Whether the lapse of time is to be given the effect of extinguishing his right or of merely barring his remedy, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity. At the expiration of five years he became, for all practical purposes a stranger to the property, and had no more dominion over it or power to convey it than he would have had if he had never had any interest therein. The statute above referred to was considered by this court in Ryhiner *v.* Frank, 105 Ill. 326, and it was there held that where land was sold on execution, and the sheriff's deed was not taken out within five years from the expiration of the statutory period of redemption, the cer-

tificate of purchase becomes void so that a sheriff's deed subsequently issued thereon is a nullity and passes no title. So in Peterson *v.* Emmerson, 135 Ill. 55, it was held that after the expiration of the five years given by the statute for taking out a master's deed the certificate becomes a nullity, and a court of equity cannot compel or authorize the execution of a deed to the purchaser or his assignee by the officer whose duty it is to make such deeds. Such being the condition of Seeberger's title, it is difficult to see upon what legal or equitable principle he can now be entitled, as against the grantees of Farr, to any portion of the relief prayed for in the bill. His certificate of purchase being *functus officio* and void, he certainly could have had no remedy against the heirs or representatives of Farr if they had still retained their interest. No remedy could have been asserted by him upon the certificate, as that had become a nullity; nor could he have enforced any remedy upon the original mor-gage, as that remedy had been completely exhausted by the foreclosure and sale." Again, in Brown *v.* Ridenhower, 161 Ill. 239, the decisions of the court were reviewed, and it was held that the holder of a certificate of purchase which had become void under the statute has no remedy against the grantees of the mortgagor; "that he can assert no remedy upon the certificate
79 as that has become a nullity, and can enforce no remedy upon the original mortgage as that remedy was exhausted by the foreclosure and sale." The court repeated what was said in Seeberger *v.* Weinberg, that the purchaser had no further interest in the premises.

In Peterson *v.* Emmerson, 135 Ill. 55, it was held that a purchaser whose certificate has been barred by the statute of limitations has no equitable right to a title.

In that case, Elizebeth Emmerson, who was a purchaser under foreclosure in 1871, and had been in possession of the premises since early in 1872 but had not taken any deed on her certificate of purchase, filed her bill to procure a deed. The court said (p. 60): "It is sticking in the bark to say, that notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute and an infringement of vested legal rights. * * * It does not alter the case that defendant in error has been in actual possession of the land since 1872, claiming ownership, and has paid all the taxes assessed thereon. Such acts do not so take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor. If she has gained any rights by the virtue of such possession, claim of ownership and payment of taxes, the courts will, doubtless, if called upon, protect her therein; but surely the existence of such rights, if any there be, does not afford just and equitable grounds for transferring to her a legal title to which she is not entitled under the law of the land."

Counsel urge that a statute of limitations cannot transfer title, and therefore the failure to take a deed did not transfer title to plaintiff. There is no pretense that a statute of limitations can transfer title, but the certificate of purchase was never color of title. It conferred a right to obtain a title, and recited that at a
80 certain time and upon a certain condition the holder would be entitled to a deed conveying a title. The right so assured to the defendant by the certificate became barred, so that no deed could be taken. The statute took away no vested right or title, but merely provided for the neglect of the defendant to take out a deed, so that the right to receive a deed conveying the legal title was lost. All limitations are in the same category. As against every right, except that of the purchaser, the law recognizes the mortgagor or his grantee as the owner of premises, and her right and lien have be-n barred and the title has been freed from it. The enforcements of statutes of limitation is frequently a hardship, but their enactment is within the power of the legislature, and it is the plain duty of the courts to uphold them. Claims are continually being barred by the running of statutes, but it has never been thought that the apparent hardship of a particular case could make any difference as to their effect. No greater hardship can inure to the defendant than inures to any person having a claim which he has, through his own negligence, allowed to become barred, when the moral obligation to pay may still remain. The extent of the hardship, in any case, may depend upon the pecuniary circumstances of the loser, and the loss of a small sum may be a greater hardship to one than the loss of a large one to another, but, in any case, the party has only himself to blame for failing to enforce his rights within the time prescribed by the statute.

The judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

Boggs, C. J., and Wilkins, J. dissenting.

81 I, A. D. Cadwallader, clerk of said supreme court, do hereby certify the foregoing to be a true copy of the opinion of said court in said cause, as the same appears from the records and files of my office.

In testimony whereof, I hereunto set my hand and the
[SEAL.] seal of said court, at Springfield, this 22nd day of October, 1900.

A. D. CADWALLADER,
Clerk Supreme Court.

(Endorsed:) Filed Nov., 12, 1901, S. W. Burnham, clerk.

82 And on the same day to-wit: the 12th day of November 1901, a writ of subpœna issued out of the clerk's office of said court directed to the marshal of said district to execute, which

said subpœna together with the memorandum thereto attached and the marshal's return thereon endorsed is in the words and figures following to-wit:

83 Form No. 186.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

The United States of America to H. W. Lightcap, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America, for the northern district of Illinois, at Chicago, in the northern division of said district, on the first Monday in the month of December next, to answer the bill of complaint of Lydia Bradley, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this twelfth [SEAL] day of November in the year of our Lord one thousand nine hundred and one, and of our Independence the 126th year.

S. W. BURNHAM, *Clerk.*

Memorandum.

The above named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against him as confessed, and a decree entered accordingly.

S. W. BURNHAM, *Clerk.*

84 *Marshal's Return.*

UNITED STATES OF AMERICA, } ss:
Northern Dist. of Illinois, }

I have served this writ within my district by delivering a true copy thereof to the within named H. W. Lightcap on November 12th, 1901.

JOHN C. AMES,
U. S. Marshal,
By A. A. BOCK, *Deputy.*

(Endorsed:) Filed Nov. 13, 1901. S. W. Burnham, clerk.

85 And on to-wit: the 2nd day of December, 1901, came the defendant in said entitled cause by his solicitors and entered his appearance in words and figures following to-wit:

Appearance.

United States Circuit Court, Northern District of Illinois.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } In Chancery.

And now comes the respondent by Wallace & Lacey his solicitors and enters his appearance in the above entitled cause.

H. W. LIGHTCAP,
By E. A. WALLACE,
LYMAN LACEY, JR.,
His Sol'rs

Address E. A. Wallace, 415 Wesley Ave., Oak Park, Ills.

(Endorsed:) Filed Dec. 2, 1901, S. W. Burnham, clerk.

86 And on to-wit: the fourth day of January, 1902, came the defendant in said entitled cause by his solicitors and filed in the clerk's office of said court his certain demurrer to the bill of complaint in words and figures following to-wit:

87 In the Circuit Court of the United States for the Northern District of Illinois.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Bill in Equity

Demurrer to the Bill.

Now comes the defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, and demurs to the said bill, and for cause of demurrer shows:

(1.) The complainant has not, by her said bill, stated such a case as entitles her, in a court of equity, to any discovery or relief from or against this defendant, touching the matters in said bill contained or any of the same.

(2.) The complainant is not entitled to sustain her bill because she has a full, complete and adequate remedy at law.

(3.) The bill does not state a case over which this court has jurisdiction. Injunction will not lie against suit in State court.

(4.) The bill practically seeks to make this court a court of review for the correction of alleged errors in the judgment of the supreme court of Illinois, and

(5.) For other good and sufficient reasons.

Wherefore defendant prays the judgment of this court, and
88 that the bill may be dismissed, and that he go hence without day.

H. W. LIGHTCAP,
By WALLACE & LACEY AND
GEORGE W. WALL,
His Solicitors.

We hereby certify that in our opinion the foregoing demurrer is well-founded in point of law.

WALLACE & LACEY,
GEO. W. WALL,
Sols. for Defendant.

STATE OF ILLINOIS, } ss.:
County of Cook }

Said defendant, H. W. Lightcap being first duly sworn on his oath says that the foregoing demurrer is not interposed for delay.

H. W. LIGHTCAP.

Subscribed and sworn to before me, this 4th day of January, A. D. 1902.

S. W. BURNHAM,
Clerk U. S. Cir. Court, Nor. Dist. of Ill.

(Endorsed:) Filed Jan., 4, 1902, S. W. Burnham, clerk.
[Endorsed:] No. 26070 In cir. ct. of U. S. northern dist. of Ill. Lydia Bradley v. H. W. Lightcap Demurrer to bill (Copy) E. A. Wallace 415 Wesley Ave Oak Park Tel. 138 Wallace and Lacey, Geo. W. Wall, sol'rs for def't.

89 And on to-wit: the 8th day of May, 1902, there was filed in the clerk's office of said court in said entitled cause a certain notice of motion in words and figures following to wit:

Notice of Motion.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, Northern District of Illinois, Northern Division, } ss:

In the Circuit Court of the United States in and for the said Northern District of Illinois, in the Northern Division Thereof.

LYDIA BRADLEY, Plaintiff,
vs.
H. W. LIGHTCAP, Defendant. } In Equity. Gen. No. 26070.

To the Hon. Geo. W. Wall and *to* & Wallace, solicitors for said defendant:

You are hereby notified that on Thursday, the 8th day of May A. D. 1902 at 10 a. m. or as soon thereafter as counsel can be heard we shall, before his Honor, Judge Grosscup, or any judge of said court in the room usually occupied by them as a court room, in Chicago, file an amended bill of complaint herein and move the allowance thereof, a copy of which is served herewith, at which time and place you can appear if you see fit.

(The exhibits to the amended bill are the same as to original bill.)

W. W. HAMMOND,
PECK, MILLER & STARR,
Solicitors for Plaintiff.

Dated, May 7th, 1902.

90 STATE OF ILLINOIS,
County of Cook, } ss:

Fred Kenny, being first duly sworn, upon oath states that he served the within and foregoing notice upon the above named Geo. W. Wall, on the 7th day of May, A. D. 1902, by leaving a true copy of said notice at the office of said Wall with his stenographer, who was then and there in charge of said office, and who subscribed the name of said Geo. W. Wall upon the face of said notice; and affiant further says that he at the same time and place delivered to said stenographer a true and complete copy of the amended bill of complaint in said notice mentioned.

FRED KENNY.

Subscribed and sworn to before me this 8th day of May, A. D. 1902.

ARTHUR A. BLISS,
[SEAL.] *Notary Public.*

(Endorsed:) Filed May 8, 1902, Marshall E. Sampsell, clerk.

91 And on to-wit: the 8th day of May, 1902, being one of the days of the regular December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to-wit:

Order of May 8, 1902.

Leave to file amended bill.

LYDIA BRADLEY *vs.* H. W. LIGHTCAP. } 26070. In Chancery.

Now comes the complainant by her solicitor and enters her motion for leave to file instanter an amended bill herein, and it appearing from the proof of service of notice that the defendant had been duly advised of this motion, leave to file said amended bill is hereby allowed.

92 And on to-wit: the 8th day of May, 1902, there was filed in the clerk's office of said court a certain amended bill in words and figures following to-wit:

Amended Bill.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

LYDIA BRADLEY *vs.* H. W. LIGHTCAP. } In Equity.

To the honorable the judges of said court, sitting in equity:

Your oratrix, Lydia Bradley, respectfully represents unto this honorable court that she is a citizen of the county of Peoria in the State of Illinois, residing in the city of Peoria, that the defendant, H. W. Lightcap, is also a resident of the State of Illinois, his place of residence being in the county of Cook.

That heretofore, on the 30th day of June, 1867, oratrix was the owner and holder of a certain mortgage given by Thomas B. Breedlove to secure the sum of $19,616.00 on 1200 acres of land in the county of Mason, State of Illinois, described as the north east quarter of section twenty two (22) the east half of the south east quarter of section twenty-two (22) the south half of section twenty three (23) and all of section twenty six (26) in township twenty three (23) north, range six (6) west of the third principal meridian; that afterwards said Breedlove and wife conveyed said premises, subject to said mortgage, to Benjamin S. Prettyman; that afterwards on the 13th day of

August, 1868, Benjamin S. Prettyman conveyed a part of said premises, to-wit: the north east quarter and the north east quarter
93 of the south east quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of the north half of section twenty-six (26) township and range aforesaid, to Absalom McCune, and on the same day procured from said Absalom McCune a trust deed conveying the last above described premises to E. G. Johnson, as trustee for oratrix, to secure the payment to oratrix of three notes which were drawn payable to her order, each for the sum of $5,000, due in one, two and three years from date; that afterwards said Prettyman taking the said Absalom McCune trust deed and notes to the agent of your oratrix delivered them to him in part payment of said Breedlove indebtedness and secured from her a release of all the lands not included in the said McCune trust deed, being about 520 acres; that in and by said trust deed it was provided that in case default should be made by said McCune or his heirs, executors or administrators in the payment of said money or any part thereof, or in the fulfillment of the covenants and duties therein contained or imposed on any of them, that then and in that case, on application of your oratrix or the legal holder of said notes, having first given 20 days' notice by publishing the same in a public newspaper printed in the county where said premises are situated, it should be lawful for said E. G. Johnson, his heirs, assigns or attorneys duly authorized to sell the said premises at public sale at such time and place as said Johnson or his said heirs, assigns or attorneys might appoint, and upon making sale as aforesaid to make and deliver to the purchaser a good and sufficient deed of conveyance in law for the same in fee simple; that afterwards on the 13th day of November, 1868, said Absalom McCune and wife reconveyed the 680 acres last above described to said Benjamin S. Prettyman; that oratrix held said notes of McCune until some time in 1871, when she discovered that he had departed from the State of Illinois after the execu-
94 tion of said papers and his residence could not be ascertained; that the lands covered by said trust deed *was* swampy and practically worthless, and that the portion she had released was the only valuable land in the original Breedlove mortgage that no taxes had been paid on said 680 acres of land in said McCune trust deed from the date of said trust deed. Thereupon oratrix investigated and found said lands to be swampy and worthless and vacant and unoccupied, and took possession of said lands, and redeemed said land from tax sales and paid the current taxes and afterwards at the March term, 1872, filed a bill in chancery in the circuit court of Mason county against said Prettyman, McCune and all other persons interested in said real estate, alleging that she had been induced to accept said McCune notes by fraudulent misrepresentations as to the value of the lands upon which they were secured and praying the court to set
95 aside the release of said Breedlove mortgage and grant a foreclosure thereof upon said 1200 acres of land, a copy of which

bill (except the exhibits thereto) and of the answer of said Prettyman thereto is filed herewith and made part hereof as "Exhibit A." At the same time and while said bill was pending, in the summer of 1872 oratrix personally entered on said lands and employed one Allison Breedlove, who resided in the immediate vicinity, as her agent and representative to hold and look after said 680 acres of land for her, and put him in charge thereof to rent the same for pasture and cut hay from such lands as were dry enough, agreeing to give him one-half of the net proceeds arising therefrom; that said Breedlove on her behalf and as her agent held active possession of the property and used it in the manner aforesaid, putting up fences as they were needed to keep in stock and cutting and selling hay from such portions of the property as could be mowed, and continued in actual, open, visible and exclusive possession of said 680 acres of land until 1878, at which time oratrix leased all of said lands to one John Coddington and ditched and drained the same so that they could be farmed, and said Coddington received the actual possession of the same from said agent of oratrix, said Breedlove, and from that time forth said Coddington was in the actual, open, visible and exclusive possession of said lands as tenant of oratrix, and gradually reduced them to cultivation, fenced and improved them, erected suitable farm buildings and reduced all of said property to a high state of cultivation. That oratrix joined in forming a drainage district by which all of said lands were thoroughly

96 drained and thereby became of great value as fa-ming lands; that after all the title and right of redemption of said Prettyman had expired and become barred and lost, and after the expiration of fifteen months from and after the master's sale in 1879 hereinafter mentioned was made, and prior to the commencement of the ejectment suits hereinafter mentioned, and relying on her absolute and complete right and title in and to the said 680 acres of land and upon the bar and extinction and loss of the right or equity of redemption of said McCune, or of those claiming under him subsequent to said trust deed to said Johnson, your oratrix expended about $5,000 in such drainage district, about $5,000 in improvements and over $5,000 in current taxes upon said property; and that your oratrix by her tenants has remained in actual, open, visible and exclusive possession of said 680 acres of land continuously since November of 1871 to the present time, and still remains in such possession; and that she has all said time been and is in such actual possession as owner, claiming to be the owner in fee in said premises.

That said bill in chancery in said circuit court of Mason county was contested by said Prettyman and was pending in said court until 1879, at which time a decree was rendered by said court adverse to complainant's prayer, ordering and decreeing a foreclosure of the said McCune trust deed instead of a foreclosure of the said Breedlove mortgage as prayed; a copy of said decree of foreclosure is filed herewith, marked "Exhibit B" and made part hereof by reference. That pursuant to said decree the lands in said McCune

trust deed were exposed for sale by the master in chancery, and oratrix, who was in possession and claiming to own said lands in order to prevent an adverse claim arising by means of such sale procured the said lands to be struck off to her for the sum of $10,000, which was applied upon the amount found due upon said
97 McCune notes, leaving a deficit still due from said McCune to her of $21,000. No personal judgment was obtained against said McCune, who had left the State of Illinois, the service upon him being by publication, but the decree provided that said McCune should remain liable to oratrix for the deficiency remaining after said sale but no part of said deficiency has ever been paid nor has said McCune returned to this State.

Oratrix further shows that the time allowed by said decree from redemption of said lands from such sale expired on the 27th day of January, 1881, and that no redemption or effort to redeem was made by said Prettyman, McCune or any other defendant in said action, nor did either of them assert any claim to said property or the possession thereof, but oratrix was then and thence continued in uninterrupted, actual, exclusive, adverse possession by her tenants, of the said 680 acres of land hostile to all the world besides, and has thence hither- continued and still continues in such actual and exclusive and adverse possession. That in the year 1885 said E. G. Johnson died intestate leaving him surviving his widow Aurilla E. Johnson, who was his administratrix, and the following named children, viz: Austin F. Johnson, Corilla J. Miller, Harriet A. Johnson, Mary G. Alfs and Nellie K. Brinton, who were his only children, and said widow and children were his only heirs at law—and who were all living and of full age on the 11th day of June, 1894; that on said last named date said heirs at law of said E. G. Johnson, deceased, in pursuance of the power conferred upon them by said trust deed, sold said lands at public sale, in pursuance of due public notice duly published as provided for in said trust deed; that at said sale your oratrix in order to prevent an adverse claim arising by means of said sale, was a bidder and was the highest and best bidder, and said lands were struck off to her at said sale
98 for the sum of $35,000. And on said last named date in pursuance of said sale said heirs at law of said E. G. Johnson conveyed said lands to your oratrix by an absolute deed of conveyance in fee simple in conformity with the power contained in said McCune trust deed, which deed by said heirs at law is ready to be produced by your oratrix.

That long afterwards on the 30th day of November, 1894, there was placed on record in the recorder's office of Mason county, Illinois, a quit claim deed from said Benjamin S. Prettyman to the defendant, which purported to convey to said defendant said Prettyman's interest in said lands, and purported to have been made and executed on the 4th day of September, 1893. When said deed was in fact made, executed or delivered your oratrix is not informed save by the record of said deed, but she charges that the same was not made, executed or delivered until after said 11th day of June, 1894, and

shortly before the recording thereof on November 30th, 1894. But oratrix alleges that at the times when said conveyance was made and recorded your oratrix was in the actual, open and visible possession of said 680 acres by her tenants as aforesaid, and that said Lightcap was by such possession charged with notice of the rights, title, claims and equities of your oratrix; and your oratrix upon information and belief charges that said Lightcap had at and before said conveyance to him actual notice and knowledge of the rights and equities of your oratrix, and that no actual, valuable or real consideration was paid by the defendant Lightcap, for said 680 acres of land, or for the said conveyance thereof; and that said Lightcap is contriving how he may deprive your oratrix of her said property under
99 color of the certain statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, hereinafter referred to and quoted, and is subjecting your oratrix and causing her to be subjected to the deprivation of her rights, privileges and immunities in and to said lands, and her property, title and vested rights therein secured by the Constitution and laws of the United States, by the proceedings and means hereinafter set forth; that said deed of conveyance from said Prettyman to said Lightcap is a cloud upon the title of your oratrix and is being used by him in order to accomplish the deprivation of your oratrix as aforesaid, contrary to section 1979 of the Revised Statutes of the United States against such cases and deprivations expressly made and provided. And said defendant is contriving now to wrong and injure your oratrix by claiming to be the owner of said real estate and by trying to take and keep possession thereof, and by denying and slandering your oratrix's title to and right of possession thereof, and which acts, doings and pretences of defendant are contrary to equity and to the manifest injury of your oratrix in the premises.

100 On the 13th day of July, 1895, the defendant herein commenced actions of ejectment against the tenants of oratrix in possession of said lands, in the circuit court of Mason county, claiming to be the owner of said lands in fee simple. These cases were consolidated and oratrix as landlord defending was substituted as defendant in said suits, and at the March term, 1896, a trial was had in the circuit court of Fulton county, to which the cases had been transferred on the motion of oratrix resulting in a finding for defendant therein of not guilty, and a judgment in favor of defendant therein. From this judgment the defendant herein appealed to the supreme court of the State of Illinois and at the October term, 1898, that court handed down an opinion reversing said judgment and remanding the cause. At the same term oratrix presented a petition for rehearing, which was allowed, and at the December term, 1898, the case was re-argued. October 19th, 1899, the said supreme court of the State of Illinois re-affirmed its former opinion, but afterwards of its own motion granted a second re-hearing and the case was again argued before the court at the February term, 1900. On the 19th day of October, 1900, the final opinion of the supreme court of the State of Illinois was filed, adhering to its order reversing the

judgment and remanding said cause for further proceedings in accordance with the views therein expressed. A copy of said opinion is published in volume 186 of the reports of cases at law and in chancery determined in the supreme court of Illinois at pages 510 to 536 thereof and is ready to be produced, and is here referred to as "Exhibit C" and made part hereof by reference.

101 That the controversy involved in said litigation was as to the effect of the statute of the State of Illinois, section 30, chapter 77, approved March 22, 1872, in force July 1, 1872, which provides as follows:

"When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time for redemption. The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time for redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When the deed is not taken within the time limited by this act the certificate of purchase shall be null and void, but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed."

In the construction of this statute the supreme court of the State of Illinois in its said final opinion used the following language:

"Before the enactment of the statute rendering a certificate of purchase null and void at the expiration of five years, this court had fixed a limitation which it deemed equitable in Rucker *v.* Dooley, 49 Ill. 377, and when the legislature, acting within their unquestionable powers changed the rule by this statute, it was upheld as valid in Ryhiner *v.* Frank, 105 Ill. 326. The effect of the statute has been several times considered, and it is no longer an open question. In Seeberger *v.* Weinberg, 151 Ill. 369, the court, after referring to the statutes, said (p. 380) 'If, then, it be assumed, as seems most probable, that Seeberger failed to obtain a master's deed, his right to obtain such a deed is barred by limitation and his certificate of purchase has ceased to be of any validity. Whether the lapse of time is to be given the effect of extinguishing his right or of merely barring his remedy, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity. At the expiration of five years he became for all practical purposes, a stranger to the property, and had no more dominion over it or power to convey it than he would have had if he had never had any interest therein. The statute above referred to was considered by this court in Ryhiner *v.* Frank, 105 Ill. 326, and it was there held that where land

was sold on execution, and the sheriff's deed was not taken out within five years from the expiration of the statutory pe-
102 riod of redemption, the certificate of purchase becomes void, so that a sheriff's deed subsequently issued thereon is a nullity and passes no title. So in Peterson *v.* Emerson, 135 Ill. 55, it was held that after the expiration of the five years given by the statute for taking out a master's deed the certificate becomes a nullity, and a court of equity cannot compel or authorize the execution of a deed to the purchaser or his assignee by the officer whose duty it is to make such deeds. Such being the condition of Seeberger's title, it is difficult to see upon what legal or equitable principle he can now be entitled, as against the grantees of Farr, to any portion of the relief prayed for in the bill. His certificate of purchase being *functus officio* and void, he certainly could have no remedy against the heirs or representatives of Farr if they had still retained their interest: No remedy could have been asserted by him upon the certificate, as that had become a nullity; nor could he have enforced any remedy upon the original mortgage, as that remedy had been completely exhausted by the foreclosure and sale.' Again, in Brown *v.* Ridenhower, 161 Ill. 239, the decisions of the court were reviewed, and it was held that the holder of a certificate of purchase which had become void under the statute has no remedy against the grantees of the mortgagor; 'that he can assert no remedy upon the certificate as that has become a nullity and can enforce no remedy upon the original mortgage as that remedy was exhausted by the foreclosure and sale.' The court repeated what was said in Seeberger *v.* Weinberg, that the purchaser had no further interest in the premises.

In Peterson *v.* Emmerson, 135 Ill. 55, it was held that a purchaser whose certificate has been barred by the statute of limitations has no equitable right to a title. In that case, Elizabeth Emmerson, who was a purchaser under foreclosure in 1871, and had been in possession of the premises since early in 1872, but had not taken any deed on her certificate of purchase filed her bill to procure a deed. The court said (p. 60): 'It is sticking in the bark to say, that notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute and an infringement of vested legal rights. * * * It does not alter the case that defendant in error has been in actual possession of the land since 1872, claiming ownership, and has paid all the taxes assessed thereon. Such acts do not so take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor. If she has gained any rights by virtue of such possession, claim of ownership and payment of taxes, the courts will, doubtless, if called upon, protect her therein; but surely the existence of such rights, if any there be, does not afford just and equitable grounds for transferring

to her a legal title to which she is not entitled under the law of the land.

Counsel urge that a statute of limitation cannot transfer title, and therefore the failure to take a deed did not transfer title to plaintiff. There is no pretense that a statute of limitation can transfer
103 title, but the certificate of purchase was never color of title. It conferred a right to obtain a title, and recited that at a certain time and upon a certain condition the holder would be entitled to a deed conveying the title. The right so assured to the defendant by the certificate became barred, so that no deed could be taken. The statute took away no vested right or title, but merely provided for the neglect of the defendant to take out a deed, so that the right to receive a deed conveying the legal title was lost. All limitations are in the same category. As against every right, except that of the purchaser, the law recognizes the mortgagor or his grantee as the owner of the premises, and her right and lien have been barred and the title has been freed from it."

But your oratrix respectfully shows that the statute thus construed by the court as divesting her of all right, title or interest to said premises by reason of her failure to take out a deed on the certificate of purchase hereinbefore set forth was enacted after the date of the said McCune trust deed and the said case of Rucker *v.* Dooley, 49 Ill. 377, referred to by said supreme court as having established a limitation upon the time for taking out a deed on such a sale at twenty years was not decided until September 1868, more than a month after the date and execution of said McCune trust deed. That at the date of said McCune trust deed the statute of 1845 was in force in the State of Illinois, and that by said statute there was no time limited within which the holder of a certificate of purchase must take out a deed.

And oratrix further shows that the law of the land as established by the decisions of the courts of last resort in the State of Illinois on the 13th day of August, 1868, was that the holder of a mortgage after condition broken was the real owner as against all the world, and that thereafter the mortgagor had only an equity of redemption which was an equitable right the creation of the courts of chancery, and that after a foreclosure or an effort to foreclose a mortgage by the mortgagee followed by possession of the premises the mortgagee's holding was considered adverse as to all the world
104 and under the title derived by and through the mortgage the mortgagee held as under claim and color of title. That unless the mortgagor redeemed in accordance with the provisions of the decree or the statute that he lost his equity of redemption, and thereafter the mortgagee was the sole owner of both the legal title and the equity of redemption.

And oratrix respectfully shows that the laws of the land as established by legislative authority and the judicial decisions of the courts of last resort, as they exist at the date of a contract become a part of it, and cannot afterwards be changed so as to impair the ob-

ligation of that contract or materially infringe upon the legal remedies provided for its enforcement.

Your oratrix shows that the said statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, as the same has been construed by the decision of the supreme court of Illinois, as aforesaid, if the same are enforced against your oratrix, do or would impair the obligation of the contract of the said trust deed from the said Absalom McCune to said Johnson as trustee for your oratrix, and has and will deprive your oratrix of her rights and remedies as they existed at the date of said contract contrary to the provisions of sec. 10, art. 1 of the Constitution of the United States of America, and that there exists in this case a controversy necessarily involving the construction of the Constitution of the United States of America as applicable to the said statute of the State of Illinois, and the decisions of the supreme court of the State of Illinois.

And your oratrix further shows that the said statute of Illinois of 1872 as construed by the supr-me court of Illinois, is not merely a limitation law, but is a law professing and attempting, as so construed, and as applied to this case, to deprive your oratrix of
105 the vested right and title which she had on the 28th day of January 1881 (when the period of fifteen months after said master's sale had fully expired) and thence thereafterwards for five years after said 28th day of January, 1881, and to terminate and put an end to that right and title; and she submits and charges that the said act as so construed and applied by the supreme court of Illinois would deprive your oratrix of her said property without due process of law contrary to sections 1 and 5 of article 14 of the Constitution of the United States, commonly known as the 14th amendment to said Constitution, and in contravention of the law of the land; and that the matter in dispute exceeds in value exclusive of interests and costs, the sum or value of two thousand dollars.

And oratrix further shows that after the order of reversal was entered in the supreme court of Illinois as above set forth, said cause came up for trial in the circuit court of Fulton county, which court applying the said statute of 1872 as so construed by the said supreme court, and after the introduction of evidence showing substantially, the facts hereinbefore set forth, directed the jury to find oratrix guilty and the defendant the owner of said lands in fee simply, and the jury was compelled so to find, and notwithstanding oratrix' motion for a new trial, judgment was entered in accordance therewith.

And oratrix respectfully submits that she has fully presented her defense at law, and that she is without remedy in this case, except in this court of equity. That it has been repeatedly decided by the supreme court of the State of Illinois, both in the several hearings of this case and in other cases, construing and applying the said statute of 1872 to deprive her of her said property and right, that she has no remedy in a court of law. Yet your oratrix maintains she is the equitable owner of the premises in controversy; that by his trust deed to

E. G. Johnson, trustee, August 13th, 1868, Absalom McCune
106 vested the legal title in said trustee and oratrix as the holder and owner of the notes described therein became the *cestui que trust,* and afterwards when the condition of said trust deed was broken and oratrix reduced the property to possession she became the equitable owner; that she has protected her title by paying all taxes accruing thereon and by buying in the lands at the master's sale, and has maintained her possession, claim and ownership ever since, while the said McCune and his grantee Prettyman, failed to redeem said lands according to the provisions of the decree of sale, made no claim to possession for more than twenty years, and have witnessed the development and improvement of said property and its growth in value by the expenditures of large amounts of money by your oratrix as aforesaid from a worthless swamp to a highly cultivated and valuable farm, without revealing their intention to claim ownership to both land and improvements. That in all the proceedings in the circuit court of Mason county by which oratrix sought to recover again the 520 acres of released land resulting in the foreclosure of the McCune mortgage, the sale of the land and its purchase by oratrix, she has done no act inconsistent with her equitable title, nor has she omitted at any time to assert her claim of ownership, nor has she suffered any decree or judgment of any court affecting her equitable title, yet by the laws of the State of Illinois as construed and enforced by its courts of last resort, after exhausting every effort and urging her defense three times before the supreme court of Illinois, the defendant is about to recover the possession of said lands and have his title thereto in fee simple established by a final judgment of a court of record, permanently clouding, if not wholly defeating oratrix' title thereto.

107 Oratrix further shows that the statutes of the State of Illinois provide that in all actions of ejectment the defeated party may have a new trial upon payment of the costs and making a motion therefor within one year after the date of the judgment. That in accordance with said statute oratrix paid the costs in the circuit court of Fulton county, and moved for a new trial within the prescribed time and thereupon the judgment against oratrix in said court was set aside, and said cause stands for trial *denovo* at the next term of said court, which convenes the second Monday of January next. But oratrix will not be able at that trial to offer any other or different defense than that she has already presented, and under the decisions of the supreme court of the State of Illinois, constr-ing and applying the said act of 1872 to deprive her of her vested property and contract right, the result of such trial must necessarily be adverse to oratrix and result in a judgment from which she could not obtain relief unless this court shall grant the relief herein prayed and the defendant be enjoined from the further prosecution of said suit.

And oratrix further shows that at the time she took possession of said lands in the summer of 1872, they were low, wet and swampy, and unfit for agricultural purposes, and used only for pasture and

hay land during the driest part of the year. That such lands were valued at from $1.00 to $10.00 per acre, and these lands were not at that time worth to exceed $10.00 per acre. That said Benjamin S. Prettyman had become the owner of the equity of redemption by his deed from Absalom McCune prior to 1872. That he lived at Pekin within ten miles of said premises and was an intimate friend of Allison Breedlove, oratrix' tenant, and frequently visited at his house within two miles of said lands and was acquainted with all that oratrix
108 and her tenant were doing with reference to said property. That in conversation with said Breedlove he always spoke of the land as having been sold to oratrix and when reference was made to the price she had been compelled to pay for it he replied that she was able to redeem it from water and make it a good farm. That afterwards when John Coddington succeeded to the tenancy of the place he frequently met Mr. Prettyman at Pekin and in conversations in regard to the property he spoke of it as land he had once owned. That said Prettyman continued to live in Pekin until after the date of his conveyance to the defendant herein and during all that time was fully advised of what was being done with and upon said premises. And oratrix shows that after the said Coddington became tenant of said premises she commenced making improvements thereon in the way of fencing and draining, and between the years 1885 and 1895 she built three dwelling houses, three large barns, three large corn cribs and other necessary farm buildings upon said premises at an expense of upwards of $5000. That she also paid for drainage assessments upon said premises upwards of $5,000. That she also paid for breaking the land which was a very expensive task on account of the strong growth of swamp grass and the peculiar nature of the ground, and for several years after the land was broken it was practically unproductive, being infested with wire worm, cut worm, and other pests. That the soil was peculiar, being almost like peat, and highly inflammable, so that great pains had to be taken to avoid burning anything on the ground, and frequently fires would catch from unknown sources and have to be put out at great expense. That the soil was also deficient on some of the elements of normal farm land so that corn did not mature, and other crops could not be raised at all.
109 That oratrix procured analysis of the soil, and applied various fertilizers to remedy its deficiencies; and about the time the said ejectment suits were commenced, she had overcome the difficulties and rendered the soil fertile and profitable. But oratrix shows that by reason of the said difficulties and expenses she had derived no income from said lands, but had spent large sums of money upon them. And further shows that as a result of her said efforts, the land was converted from a worthless swamp to good farm lands worth in the open market $65.00 per acre. And oratrix charges that said Prettyman had full knowledge of all these facts, and yet at no time did he assert any claim of ownership to the property, or notify oratrix or her agents that he had any claim

to the same, but stood by and allowed oratrix to spend said sums of money for the improvement and betterment of said premises. Wherefore oratrix shows that it would be highly inequitable and unjust to permit the defendant as the voluntary grantee of said Prettyman, without valuable consideration, to assert his title to said premises as against oratrix, and that he is equitably estopped from doing so; and in this respect oratrix has no remedy in a court of law, but can only secure relief by means of the equitable powers of this court.

In consideration whereof and forasmuch as your oratrix is without remedy in the premises by the strict rule of law and can only have relief in a court of equity where such matters are properly cognizable, and to the end that said H. W. Lightcap, who is made party defendant to this bill, may be required to make full, true and direct answer to the same, but not upon oath, his oath being specifically waived, and that said H. W. Lightcap be required by the decree of this hon-
110 orable court to convey to your oratrix by sufficient deed, all his right, title, interest claim and demand in and to said lands; and that said H. W. Lightcap be permanently enjoined from asserting ownership of said lands, from entering thereupon or taking possession thereof, or dispossessing your oratrix thereof, or denying the title of your oratrix thereto; and alternatively that said H. W. Lightcap may be permanently enjoined from further prosecuting said action of ejectment in the circuit court of Fulton county aforesaid, or any other court, and that by the order and decree of this court, the deed of said Benjamin S. Prettyman to said H. W. Lightcap may be ordered to be given up and surrendered for cancellation, and your oratrix prays that said last mentioned deed be declared to be a cloud upon the title of your oratrix, and that your oratrix' rights in the premises as above set forth may be declared, confirmed and established by the order and decree of this court, and that your oratrix may by the order and decree of this court be confirmed in her possession and occupancy of said premises against said H. W. Lightcap, and to the end that pending the hearing of this petition and until the matters and things herein alleged can be established and proved before this honorable court, a preliminary injunction may be issued against the defendant, H. W. Lightcap, enjoining him from prosecuting the said action of ejectment in the Fulton county circuit court, or in any other court, until the final order and judgment of this court herein; and that your oratrix may have such other and further or different relief as to your honors shall seem meet, and to equity shall appertain. May it please your honors to grant to your oratrix a writ of subpœna to be directed to said H. W. Lightcap, thereby
111 commanding him at a certain time and at a certain penalty therein to be limited personally to appear before this honorable court and then and there full, true, direct and perfect answer make (but not under oath) to all and singular the matters and things hereinbefore alleged and set forth, and to abide by and perform such

order, direction and decree as may be made against him in the premises, and as shall seem meet and agreeable to equity.

And your oratrix also prays that a writ of temporary injunction issue out of and under the seal of this court, as aforesaid, directed to said defendant, and enjoining and restraining the said defendant, his attorneys, representatives and agents, from prosecuting or further prosecuting the said action of ejectment in the circuit court of Fulton county Illinois, until the further order of the court.

And your oratrix will ever pray, etc.

W. W. HAMMOND AND
PECK, MILLER & STARR,
Solicitors for Complainant.

W. W. HAMMOND,
JOHN S. MILLER,
MERRITT STARR,
Of Counsel.

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, Northern District of Illinois, Northern Division, } ss.

In the Circuit Court of the United States in and for the said Northern District of Illinois, in the Northern Division Thereof. In Equity.

LYDIA BRADLEY, Plaintiff,
vs.
H. W. LIGHTCAP, Defendant. } Gen. No. 26070.

112 Merritt Starr, being first duly sworn on oath, states that he is one of the solicitors for the plaintiff in the above entitled cause; that the foregoing draft of the proposed amended bill has been settled and approved and signed by counsel; that said amended bill is not intended for the purpose of delay or vexation, but because the same is considered to be material for the cause of the plaintiff.

MERRITT STARR.

Subscribed and sworn to before me, this 7th day of May, A. D. 1902.

GEORGE A. MILLER,
[SEAL.] *Notary Public.*

(Here follow Exhibits A and B which are the same respectively as Exhibits A and B to the original bill heretofore set out in this transcript pages 21–57 inclusive and not again copied here.)

(Endorsed:) Filed May 8, 1902. Marshall E. Sampsell, clerk.

113 And on to-wit: the 12th day of May, 1902, there *was* filed in the clerk's office of said court in said entitled cause the affidavits of Lydia Bradley, A. Breedlove, P. Coddington, J. A. Coddington, George Gilson and Austin Johnson, which said affidavits are respectively in the words and figures following to-wit:

114 *Affidavit of Lydia Bradley.*

United States Circuit Court, Northern District of Illinois.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Bill for Injunction.

STATE OF ILLINOIS, }
Peoria County, } *ss:*

Lydia Bradley, being first duly sworn on oath, states that she is a resident of the county of Peoria and the State of Illinois, and is 86 years of age. That on or about the 30th day of June, 1867, she was the owner and holder of a certain mortgage and notes of Thomas B. Breedlove in the sum of $19,616 secured upon 1200 acres of land in Mason county, Illinois, described as follows: N. E. ¼ sec. 22; E. ½ of S. E. ¼ sec. 22; S. ½ of sec. 23; all sec. 26 in town 23 N., range 6 W. of the 3rd P. M. That afterwards on or about the 13th day of August, 1868, Benjamin S. Prettyman a resident of Pekin, Tazewell county, Illinois, called upon affiant and stated that he had purchased said lands from Thomas Breedlove subject to the mortgage aforesaid. That he had now arranged for a sale of 680 acres of he land to one Absolom McCune who was a large cattle dealer and would use the said lands for pasturage for cattle which he would buy in the West. That the 680 acres sold to McCune was the best part of the 1200 acres and that the purchase price was $25,000, and that said McCune would pay in cash all but $15,000 for which he proposed to give a mortgage upon the 680 acres of land to secure his three notes of $5000 each,
115 due in one, two and three years from date. These notes said Prettyman desired to give to affiant in part payment of the amount due upon the said Breedlove mortgage, offering to pay the remainder in money. That said Prettyman further stated that the lands were all capable of being cultivated and part of them were then under cultivation and producing corn. Affiant replied that she would have the land- investigated and if they were as represented she would accept the said McCune notes as part payment of the Breedlove indebtedness and release the remaining 520 acres of land. That affiant then instructed her agent and business manager, Mr. Cockle, who was present at this conversation but who is now dead, to go and see the lands and report to her their condition and value. That subsequently said Cockle did report that the

representations of said Prettyman were correct, but affiant now believes that said Cockle was either deceived by said Prettyman and shown lands other than those included in the McCune mortgage or else that he was fraudulently persuaded by said Prettyman not to visit the said lands at all but to make such report upon the strength of said Prettyman's representations. Affiant, however, relying upon and believing the said representations of Prettyman and the report of her business agent accepted said McCune notes which were made payable direct to her as part payment of said Breedlove mortgage, received the remainder of the amount in money and released the Breedlove mortgage. That when the interest became due in August, 1871, she was unable to get any reply to her letters notifying said McCune that the interest was due on his mortgage, and then set on foot inquiries and learned that said McCune had left the State of Illinois, had never taken any possession of said lands at all but had left the State almost immediately after the execution of said
116 papers, and affiant believes that said McCune was an irresponsible person, wholly unable to make any such payment as was represented to have been made by him, and affiant believes no such payment ever was made but the transfer to said McCune and the mortgage back to this affidavit were arranged and made by said Prettyman with a view to swindling and defrauding affiant. Affiant further learned that the taxes had not been paid upon the property since the date of said McCune mortgage and she thereupon redeemed the same from the tax sales of 1869 and 1870 and paid the taxes for 1871. She then caused the lands to be advertised for sale under the said trust deed, and on the day appointed for sale sent her agent down to Manito to attend the sale but he returned and reported that the lands were too swampy to farm, and could not be sold, and he had adjourned the sale. Affiant then sent Austin F. Johnson to see the lands and take possession of them and make such use of them as he could. This he did in the fall of 1871, but was unable at that time to secure a tenant. That her next effort was directed to setting aside the said transaction with Prettyman and the said release of said Breedlove mortgage and she placed the papers in the hands of her attorney for that purpose, and at the March term, 1872, of the circuit court of Mason county, he filed a bill in chancery to set aside said transaction and said release, alleging the facts hereinbefore set forth. That in the summer of that year, she believes in the month of August, 1872, she went down to visit the lands and inspect them herself. That one Allison Breedlove who lived about two miles north and east of the lands went with her to examine the lands and she then found that all of said lands were low, wet and swampy except perhaps 20 or 30 acres known as Hickory Grove mound, which was 25 or 30 feet higher than the surrounding lands and of
117 different soil and appearance. That there was no plowed ground upon the farm except about 11 acres of said land in the S. W. corner. That it was so swampy, low and wet that it would not even bear the weight of a horse. That it was incapable of use as farming land and could only be used for mowing hay and

for pasturage in the driest part of the year, when parts of the land would be solid enough to support cattle. That it was not worth more than $10 per acre. That no person was in possession or charge or control of it but it was wholly abandoned and unused. That affiant thereupon took possession with the object and purpose of making the most she could of a very bad bargain and leased the land to said Allison Breedlove upon terms then and there agreed upon and put said Allison Breedlove in possession of said lands to cut and sell the hay and to take in cattle for pasturage, paying her one-half the net proceeds of the land. That said Allison Breedlove then and there took possession of said property and from that time until about the year 1881 when he left the State of Illinois, he was continuously in the open, exclusive possession of said property, as tenant of affiant, keeping out trespassers and appropriating the said land to the use of this affiant so far as it was possible in its condition. That during the last two or three years of Breedlove's lease he sub-let the whole property to John A. Coddington who cut and sold considerable hay.

That in December, 1881, affiant undertook to improve the property and reduce some of it to cultivation, and for that purpose built a house on the mound, costing about $1000 and made a lease to W. N. Hitchcock and Jacob Behner, but the effort proved a failure on account of the swampy soil, and said John A. Coddington took the property again and continued to use it for hay taking a
118 lease from affiant for all of said lands and succeeded to the possession and from that time until March 1st, 1895, said John A. Coddington and his sons Phineas Coddington and Wally B. Coddington occupied the whole of said premises living upon them and having the open, undisputed and exclusive possession of said lands as tenants under affiant.

That in the fall of 1884 affiant began to improve said premises by ditching, fencing, breaking the sod and erecting farm buildings. That by the organization of the Hickory Grove drainage district and the construction of a system of ditches through said lands and adjoining lands the water was drained off and the lands were made dry enough to cultivate. But not until the summer of 1885 were the lands dried out sufficiently to enable affiant to break up the sod. That affiant began at that time to reduce the land to cultivation but found the sod so heavy that breaking was very expensive and she was obliged to pay large sums of money, to-wit, the sum of $3.50 per acre for getting said sod broken. That after said lands were broken they proved to be infested with wire worm, cut worm and other pests which almost totally destroyed the crops for several years. That the soil itself proved to be very light, almost like peat and the corn failed to reach maturity before frosts came on in the fall so that for several years the crops were of very little value. But affiant persisted in her efforts to reduce said land to cultivation and applied various fertilizers and correctives to said soil and by having analysis of the soil made she was finally successful in correcting the deficiencies of said soil so as to make it productive. But affiant

shows that she was put to much expense in doing this and that the expense of breaking and correcting said soil was greater than the total income derived from the crops for many years after it was drained.

119 And affiant further states that afterward said farm was divided into three parts and said Wally B. Coddington and Phineas Coddington were each given farms and affiant then erected two more dwelling houses at an expense of $1000 each, three barns at an expense of $500 each, and three corn cribs at an expense of $350 each, for the accommodation of said additional tenants.

Affiant also paid all of the general taxes accruing against said lands amounting to the sum of $5000 on the first day of July, 1895. That she also paid all of the drainage assessments in said Hickory Grove drainage district amounting to over $5000 on the 1st day of July, 1895.

And affiant further shows that said bill in chancery to set aside the release of the Breedlove mortgage was prosecuted in the circuit court of Mason county and was defended and resisted by said B. S. Prettyman for seven years until October, 1879, when a decree was rendered not in accordance with the prayer of the bill but finding that said McCune mortgage was the only lien upon said premises and ordering a foreclosure thereof. That this was a defeat for affiant and she then realized that she must take the lands she had possession of as payment of the mortgage debt and interest. That when said land was sold at the master's sale she had the same struck off and bid in for her at the sum of $10,000 for the purpose of protecting her title and possession and preventing the arising of an outstanding title against said lands. That the certificate of purchase was taken and held by her attorneys Johnson, Dearborn and Campbell and affiant has no recollection of ever having seen it. But afterwards in 1885 when said Johnson reported to her the results of said litigation he advised her that the title was now in her and that she had got a complete title to said lands but had been

120 defeated in her effort to recover and secure the remaining lands released from the Breedlove mortgage. That affiant understood and believed that a deed had been issued to her by the master in chancery in such foreclosure suit but is not now able to find such a deed nor has she been able to find the said certificate of purchase? That thereafter she continued to hold the said lands as she had done from the time she took possession in 1872, claiming to be the owner thereof and has ever since held such possession and claimed such ownership. That she has paid all of the taxes accruing thereon and no person or persons has ever interfered with her possession or claimed any right to said lands up to July 13th, 1895, when the said Henry W. Lightcap, defendant in the above entitled cause brought actions of ejectment in the circuit court of Mason county against the tenants of affiant in possession of said lands, claiming to be the owner thereof in fee. That affiant immediately entered her appearance and was substituted as defendant in place of her said tenants and upon her motion the case was trans-

ferred to Fulton county for trial. That the first trial took place at the March term, 1896, resulting in a judgment against the plaintiff. That the plaintiff in said case appealed to the supreme court of the State of Illinois and at the October term of said court the said judgment was reversed and the cause remanded to the circuit court. That affiant caused her attorneys to apply for a re-hearing which was granted and the case was again argued before the supreme court of the State of Illinois at the December term, 1898. That afterwards on the 19th day of October, 1899, the said supreme court re-affirmed its former opinion holding that affiant had no title to said premises because she was unable to show that she had taken out a deed from the master in chancery within a certain time
121 limited by the statutes of the State of Illinois. But affiant caused her attorneys to make a further application for a second re-hearing before said court, which was granted at the February term, 1900, and said cause was again re-argued, but on the 19th day of October, 1900, the said supreme court of the State of Illinois again adhered to its former opinion reversing and remanding said cause. That afterwards at the May term of the circuit court of Fulton county, 1901, said cause came up again for trial before said court and affiant made such defense as she was able under the rulings of the said supreme court, but said cause was taken from the jury by the trial court and the said jury were instructed to find affiant guilty as alleged in the said declaration. And thereupon judgment was entered in favor of said H. W. Lightcap. But affiant being advised that under the laws of the State of Illinois she was entitled to a second trial of said cause as a matter of right made application to said court for such new trial and the same was granted and said cause now stands for hearing *de novo* at the January term, 1902, of said circuit court of Fulton county.

And affiant further shows that it appears by the deeds offered in evidence at such trial that said Benjamin S. Prettyman after the execution and delivery to affiant of said mortgage by Absolom McCune took a reconveyance of said property subject to said mortgage to himself and that at the time of the prosecution of said bill in chancery in the circuit court of Mason county he was the holder of the equity of redemption and continued ever after to be the holder of such equity of redemption until the same was extinguished by such foreclosure proceedings, and not until a very short time before the commencement of said ejectment suits by the defendant herein did he make the conveyance to the defendant under which he claimed in said ejectment suits. That said H. W. Lightcap
122 was at that time a resident of Havana in Mason county which is within a few miles of the lands hereinbefore described and that said H. W. Lightcap knew that the lands were in possession of affiant and her tenants but made no inquiry of them or of her and gave no notice to affiant or her tenants that he had or claimed to have any title to said lands. That said Lightcap might have ascertained by visiting the lands or by calling upon affiant what her right, title, interest and claim to said premises was, but that the

first notice affiant had of said Lightcap's claims was when service was made upon her tenants in the actions of ejectment above referred to. That said Prettyman lived within ten miles of said lands, was frequently in the vicinity and was able to know, and affiant believes did know, of the improvements, expenses and betterments which affiant was bestowing upon said premises, but during all that time he made no claim to title or ownership and never disclosed to affiant or her agent or tenants that he had or claimed to have any interest in said premises. That Pekin is only ten miles from Peoria where affiant resides and said Prettyman could at any time have communicated with affiant.

And affiant further shows that by means of the improvements she has put upon said premises the land has increased in value so that it is now worth and would sell in the open market for $65.00 per acre. That said McCune has never returned to the State of Illinois so far as she is aware and that the deficiency judgment against said McCune in said foreclosure proceedings has never been paid. That neither said McCune nor said Prettyman nor any defendant in said foreclosure suit ever paid or offered to pay to affiant any part
123 of said indebtedness or to redeem said premises from said foreclosure sale.

LYDIA BRADLEY.

Subscribed and sworn to before me, this 6th day of May, A. D. 1902.

[NOTARY SEAL.] CLARA E. COMSTOCK,
Notary Public.

(Endorsed:) Filed May 12, 1902 Marshall E. Sampsell clerk.

121 *Affidavit of Allison Breedlove.*

STATE OF INDIANA, } ss:
Morgan County, }

Allison Breedlove being first duly affirmed on oath states that he resides at Monrovia, Morgan county, Indiana. That prior to 1881 he resided in Tazewell county, Illinois, near the Hickory Grove mound, which is situated on the land known as the Bradley farm. That affiant owned and lived on a farm about two miles from Hickory Grove mound. That he was acquainted with T. S. Bradley, now deceased, who was husband of Lydia Bradley, and after the death of said T. S. Bradley had frequent business relations with Lydia Bradley. That said Hickory Grove farm was a part of a large tract of land once owned by the Breedlove family, and affiant had been familiar with it many years prior to the time it came into the possession of Lydia Bradley. That affiant's uncle Bales Breedlove when he was owner of the land fenced it and used it for pasture, and although the fires frequently burned over the land in the fall, portions of the

fence remained, and the owners were accustomed to fix them up each year so as to keep cattle in. That Thos. C. Reeves and Tom Breedlove subsequently became the owners of said land, although the title stood in the name of Tom Breedlove. That Tom Breedlove borrowed money from T. S. Bradley on 1200 acres of the Breedlove tract, including the 680 acres now claimed by Mrs. Bradley. That subsequently he sold the 1200 acres to Benjamin S. Prettyman, who resided at Pekin, Illinois, about ten miles from the land, sub-
125 ject to said mortgage to Bradley. That while said Prettyman was the owner of said lands he used them in much the same manner that other owners had done, and cleaned out and deepened the ditches. Afterwards through some arrangement with Mrs. Bradley of which this affiant had no direct knowledge said Prettyman claimed to have sold the 680 acres to one Absolom McCune, and to have secured the release of the 250 acres lying to the south, and said Prettyman continued to claim and exercise acts of ownership over said 520 acres of land and afterwards sold them to one Henry Dix. McCune never did anything with the land to affiant's knowledge and after the deal was made said affiant never heard of said McCune in those parts. Some time after this transaction Mrs. Bradley inquired of me about the lands and about McCune. I told her what I knew and offered to take her over to see the land. I knew from what I had heard of the transaction which piece had been deeded to McCune. So she came down to Green Valley in the summer of 1872, in real warm weather, and I took her over to the land. It was all swamp except the mound, which stood up like an island in the middle of the swamp and was a different formation. She tried to walk out onto the land stepping from one bunch of grass to another but could not go far. Some parts of the land were more solid than the place she tried. She was very much surprised to find the land so poor. She offered me a lease of the land if I would give her one half the net proceeds of the hay and pasturage, and I accepted her offer. I took charge of the land at once, and from that time until some time in 1882 when I came to Indiana I had the exclusive con-
trol and possession of the land as tenant under Mrs. Bradley,
126 and made regular settlements with her for the proceeds of hay and pasturage. I sold the hay on the ground, the purchaser choosing the best place to cut and paying by the acre or ton for what he took off. I also took in cattle to pasture and made fences enough to keep them in. No one was permitted to get hay or turn cattle in there without my permission, and I believe I had exclusive possession of the land all that time, and I made all the use of it possible in its condition at that time.

During all this time Benjamin Prettyman was a frequent visitor at our house and knew that I had charge of the land for Mrs. Bradley, and frequently talked with me about it. When reference was made to the manner in which he had unloaded the land upon Mrs. Bradley he would reply that he would let Mrs. Bradley have it. She was able to drain it.

Affiant further states that he then owned and still owns large

tracts of land in that vicinity and had owned and dealt in similar lands in that vicinity, and was acquainted with the values of such lands; that the lands referred to were worth at that time not more than $10.00 per acre.

That for a year or two before affiant left Illinois he sublet all of said lands to John A. Coddington who made roads through the land and cut a great deal of hay, and affiant left him in possession of the lands.

And further affiant saith not.

ALLISON BREEDLOVE.

Subscribed and affirmed to before me, this 21st day of November, A. D. 1901.

[NOTARY SEAL.]

N. E. HUBBARD,
Notary Public.

My com. expires Oct. 30th, 1902.

(Endorsed:) Filed May 12, 1902 Marshall E. Sampsell, clerk.

127 *Affidavit of Phineas Coddington.*

STATE OF ILLINOIS, } ss:
Mason County, }

Phineas Coddington, being first duly sworn on oath states, that he is a son of John A. Coddington, thirty-six years old, and resides in Mason county. That he knew the Hickory Grove farm or Lydia Bradley farm and lived on it with his father, going there in 1878. That they occupied the whole of the farm which was then low, wet, swamp land and used only for cutting hay. That there had been fences around the land before they moved onto it and there were still evidences of the fences partly burned off but sufficient to mark all of the lines on all sides of the land. There was a ditch on the west line at that time. Later when the land was drained by the Hickory Grove drainage district a ditch was run on the east line and the ditch on the west line was deepeded and in so doing the fence posts referred to were dug up and affiant pulled a good many of them out of the land. It was evidently an old fence. There was one small piece of the land, about eleven acres, in the southwest corner which came up onto the sand land and was dry enough to cultivate. This was all the land of the 680 acres which was cultivated at the time we went onto the place. The first three years we rented under Allison Breedlove who was acting as Mrs. Bradley's agent for the land. After that my father took a lease directly from Mrs. Bradley. Later when I married, Mrs. Bradley divided the farm and gave me a lease of 240 acres of the east side. She had already built a house there for my father and at this time built another house on the west side of the mound for him and I took the old house for

my own. She also built a barn and a corn crib at each place.

128 Later on when my brother Wally Coddington came of age she gave him the west 200 acres of the land and built a house and barn and corn crib on that. After the dredge boat had gone through and dug the main ditches Mrs. Bradley laid tiling all through the land at an expense of about $600. All of the buildings, fences, etc., must have cost more than $5000. I remember going with my father to Pekin at one time, where we met B. S. Prettyman at his office and he talked with us about the farm. He knew that we were tenants on Mrs. Bradley's farm and seemed to be well posted about what was going on in the neighborhood. He said that he had once owned the land and mentioned what ditching and fencing he had done there when he owned it. He made no claim that he had any interest in it at this time. During all of the time we lived on the farm I never heard any one make any claim to the possession or the title of the farm as against Mrs. Bradley. I moved off of the place in 1894. The first house was built in 1881, the last one in 1892.

PHINEAS CODDINGTON.

Subscribed and sworn to before me, this 25th day of November, A. D. 1901.

CLARA E. COMSTOCK,
Notary Public.

[NOTARY SEAL.]

(Endorsed:) Filed May 12, 1902. Marshall E. Sampsell, clerk.

129 *Affidavit of John A. Coddington.*

STATE OF ILLINOIS, } ss:
Mason County. }

John A. Coddington being first duly sworn on oath states, that he is a resident of the county of Mason and State of Illinois, and is sixty years of age. That he has known the Hickory Grove farm also called the Lydia Bradley farm since 1878. That he rented the hay ground on said land from Allison Breedlove as agent of Lydia Bradley in that year and from that time on until said Allison Breedlove gave up the land and left the State affiant rented the hay land from him and paid the rent to him as such agent of Lydia Bradley. That after said Allison Breedlove gave up the land affiant took the lease of all of said land consisting of 680 acres and with himself and his two sons continued to occupy the land until 1894 just before the commencement of the ejectment suits by H. W. Lightcap against Mrs. Bradley's tenants. That affiant then removed to another farm of Mrs. Bradley's and was succeeded in the possession of said Hickory Grove farm by other tenants of Mrs. Bradley.

That when affiant first knew the said farm it was low, wet, swampy land, unfit for cultivation and no part of it capable of cultivation except one corner which ran up onto the sand land, about eleven acres of which was dry enough to farm, and one half of Hickory Grove mound which was like an island in the swamp and was used for pasture and later for the site of the dwelling houses. The mound was covered with hickory timber.

That affiant first rented the ground from Allison Breed-
130 love at $1.00 per acre for the hay he could cut off of it, and built hay roads and cut canals through the land so as to enable him to get the hay off. A part of the time the hay was loaded onto boats and floated out. That during this time affiant had exclusive use of all of the lands under Allison Breedlove and later when he took a lease of them himself he had exclusive use of all of the lands and was in open and exclusive possession thereof as tenants of Lydia Bradley. That the lands in the condition they were when affiant first took them were of comparatively little value and were estimated to be worth all the way from $1.00 to $10.00 per acre. That soon after affiant took a lease to himself Mrs. Bradley built him a house on the Hickory Grove mound costing about $1000. She also furnished him with a car load of cedar posts and he began fencing the land and from that time on work was continued upon the property in the way of fencing, ditching and draining until the Hickory Grove drainage district was formed in 1885 when the land was thoroughly drained of water by a large ditch running through the land and also on the east line. After the land became dry enough to plow Mrs. Bradley hired me to break the land up, paying me $3.50 an acre for the breaking. It was very difficult work, the land being full of strong, hard roots, and when broken up it was so soft that plows would not scour in it and the land was like decomposed vegetable matter, so light that it could not turn over with the plow. As soon as it became dried out it was inflammable so that we could not burn the corn stalks on the ground without setting the ground afire and when fire got started in the soil

it would burn clear down to the water and destroy the
131 soil. It was necessary to keep constantly on the lookout for accidental fires and frequently to fight the fire for days in order to save the land. After the land had been broken we tried growing corn upon it but the soil seemed to be different from other lands and the corn did not get ripe but would be still growing when the frosts came in the fall. It was also infested with wire worms, cut worms and other pests year after year so that it was very unproductive and difficult to manage. After the ground got thoroughly dried out it began to crack open so that a horse could not walk across it and it became impossible to plow the land in any ordinary way. We were obliged to rig wire ropes across the land and draw the plow and plow the cracks shut. It was more difficult work than the original breaking. These difficulties continued for several years so that it was not until a very short time before I left the farm that it began to produce as much as it cost, to farm it.

When my eldest son, Phineas Coddington, married, Mrs. Bradley built another house on the mound and also built a large corn crib holding 5000 bu. of corn, and a barn holding ten head of horses and their feed. She also built a new barn on the place where I lived. When my second son came of age she built another house on the farm for him, together with a barn and corn crib. These improvements must have cost in the neighborhood of $5000. She also laid tile from the main ditches over all of the land at a large cost and expense. It was also necessary to throw up a road across the swamp leading to town and this road ran on Mrs. Bradley's north
132 line and she paid for half of the work of throwing up the road and digging the ditch along the side.

I knew B. S. Prettyman very well and saw him frequently. He owned land in the immediate vicinity of this farm and was frequently in the neighborhood.

Affiant at one time had some conversation with him in regard to the farm in which Mr. Prettyman showed a full knowledge of what was being done with the land and that it had been redeemed from water and highly improved and spoke of the land as property that he had once owned and told what he had done with the land when he owned it. But at no time during the tenancy of affiant did anybody ever claim any right, title or interest in said property or right to the possession thereof except Lydia Bradley.

JOHN A. CODDINGTON.

Subscribed and sworn to before me, this 26 day of November, A. D. 1901.

A. E. BAIRD,
Justice — Peace.

(Endorsed:) Filed May 12, 1902. Marshall E. Sampsell, clerk.

133 *Affidavit of George Gilson.*

STATE OF ILLINOIS, } ss:
Mason County, }

George Gilson, being duly sworn on oath states, I reside at Havana, Illinois, am fifty-four years old. I lived in Mackinaw Bottom in 1872 on land adjoining the Lydia Bradley farm on the north. I worked for Bart Breedlove, a brother of Allison Breedlove. I knew the latter very well. He lived about two miles from us. I assisted him in looking after Mrs. Bradley's land from 1872 to 1875. I was present when Mrs. Bradley visited the land in 1872. She came down with Mr. Breedlove in a buggy and I rode over a horse back. She went onto the land a little ways but could not go far as the land was very low and swampy. I heard some of the conversation between her and Mr. Breedlove about his taking charge of the land for her upon a percentage of the profits. From that time Allison

Breedlove acted as Mrs. Bradley's tenant and agent for the property. I used to watch people from going in there and cutting wood off of Hickory Grove mound. I was there all the time looking after cattle and Mr. Breedlove told me if anybody wanted any grass or to turn in cattle I could attend to it for him. I was herding cattle on the adjoining land and did this as an accommodation to him. I helped put up fences around the outside lines to keep the cattle in. We put up some fences the next spring after Mrs. Bradley was there. There were pieces of fence and posts along the lines but they would get burned off about every year when the fire ran over the swamp and we had to repair them. We strung some new wire. We put up the fences to keep in cattle
134 which we had taken in for pasture on Mrs. Bradley's land. The owners of the cattle made the arrangements with Mr. Allison Breedlove. Everybody in the neighborhood turned cattle in there. I was there as often as once a week and looked after the fences and pulled cattle out of the mud when they got mired. There was a good deal of hay cut off of the land during this time. The people who cut the hay bought it of Mr. Allison Breedlove. They went in and selected their own place for cutting the hay, picking out the highest spots and most convenient to get at the hay. I also knew Benjamin Prettyman intimately. He owned land adjoining on the north and was frequently in that vicinity. I had many talks with him. Once in a while we used to josh him about selling the land and getting such a price for it and he would laugh in a joking way and say, "Why, Mrs. Bradley has got the money, she can spend it," or something of that kind and pass it off. He never denied that the land was Mrs. Bradley's. He said the land was wet and marshy but Mrs. Bradley had the money to ditch it. The land was very soft up there where Mrs. Bradley's land was but farther north towards the Mackinaw creek the ground was harder and good farming land. You could not get across Mrs. Bradley's land with a wagon. There were only about two months in the year when cattle could pasture on it. There was a mound on the land which was high, solid ground and on this there was considerable hickory timber. I used to have to watch people from going in there and cutting it. The place was known as the Hickory Grove mound and as the Widow Bradley land. The lands did not lie in open
135 commons and cattle turned out onto the highways could not get onto this land without going over other people's farms. No cattle were put in there without permission of Allison Breedlove and no hay was cut off of there without his permission so far as we knew. Mr. Prettyman lived in Pekin about ten miles northeast of these lands.

(Signed) GEORGE GILSON.

Subscribed and sworn to before me, this 16th day of November, A. D. 1901.

[NOTARY SEAL.] JOHN W. PITMAN,
Notary Public.

(Endorsed:) Filed May 12, 1902. Marshall E. Sampsell, clerk.

136 *Affidavit of Austin F. Johnson.*

United States Circuit Court, Northern District of Illinois.

LYDIA BRADLEY } Bill for Injunction.
vs.
H. W. LIGHTCAP. }

STATE OF ILLINOIS, } *ss:*
Peoria County, }

Austin F. Johnson, being first duly sworn on oath states, I am 55 years old and a resident of the city of Peoria. I was bookkeeper and business agent for Lydia Bradley from July 1, 1871, to some time in 1880. Among her securities I found three notes of Absolom McCune for $5000 each, drawing 7 per cent., semi-annual interest, secured by trust deed upon land in Mason county, Illinois. The notes bore date in 1868; the interest was past due and I notified McCune by mail, but the letters came back uncalled for. I never got any response, and never succeeded in finding him although I made great efforts to do so.

I also discovered that the taxes on the property had not been paid from the date of the trust deed, and I redeemed the land and paid the taxes of 1871.

Then I went down to Manito in 1871, can't fix the date, to see the land and see what said complainant could do with it. I found it vacant and unoccupied and no one looking after it. That on account of default in payment on said notes and breach of the conditions in said trust deed, I, for said complainant, Lydia Bradley, and in her right, for the purpose aforesaid, actually went upon the land and went over so much thereof as its swampy condition would permit and investigated the condition of all of it. That I did so for
the said purpose of asserting physical control thereof, and in
137 connection therewith I endeavored to make arrangements
with some one to take from me as complainant's agent, and for charge of, the land, but did not succeed in then making such arrangement, but later opened negotiations with Allison Breedlove which resulted in his taking a lease. From that time on we had exclusive possession of the property and derived some income from it. At the same time Mrs. Bradley prosecuted a suit to recover the other lands she had released.

No one claimed those lands or disputed her right to them and I took them and managed them just the same as I did other lands belonging to Mrs. Bradley. We knew McCune had left the country and the land was not worth the debt so we considered the lands Mrs. Bradley's and never expected them to be redeemed

AUSTIN F. JOHNSON.

Subscribed and sworn to before me, this 9th day of May, A. D. 1902.

CLARA E. COMSTOCK,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed:) Filed May 12, 1902, Marshall E. Sampsell, clerk.

138 And on to-wit: the 12th day of May, 1902, being one of the days of the regular December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to-wit:

Order of May 12, 1902.

Demurrer taken under advisement.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } 26070.

Now come the parties by their solicitors.

This cause comes on to be heard upon the demurrer of defendant filed herein.

The court, after hearing the arguments of counsel, and not being sufficiently advised takes the matter under advisement with leave to complainant and defendant to file briefs by Friday morning next.

139 And on to wit: the 22nd day of May, 1902, there was filed in the clerk's office of said court in said entitled cause a certain opinion in words and figures following to-wit:

Opinion.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Peck, Miller & Starr, H. 1758; Wallace & Lacey, Geo. W. Wall, C. 1122.

Memorandum opinion.

GROSSCUP, *Circuit Judge:*

If the bill was before me in a case presenting diversity of citizenship, so that the court would have full concurrent jurisdiction with the State court, in administering equity upon the state of facts disclosed, the supposed barrier to relief would probably be easily overcome. I do not look upon the statute of 1872, as one of limitation, in the same sense as a statute limiting the time within which fore-

closure proceedings must be brought. In such a case, suit is barred because of the presumption that the debt has been paid; and payment leaves the mortg-or, so far as the mortgage is concerned, the unencumbered owner of the property. But the failure to take out a deed within five years, raises no presumption that the debt has been paid. It is in effect, simply a limitation upon the time within which the foreclosure decree shall be availed of, and when such limitation has expired, the parties are relegated to their rights, as if no
140 foreclosure had been attempted. I do not see in the statute a purpose to forfeit the purchaser's title to the mortgagor—a forfeiture founded upon no equity, whatever.

The difficulty of this case, however, is in the question of jurisdiction raised. The contention of the complainant is, that taking the allegations of the bill to be true, complainant has two sources of title: (*a*) title by purchase under the foreclosure decree; and (*b*) title by possession as mortgagee; that the statute of 1872, as construed by the supreme court in the ejectment case, in effect, deprives her, not simply of the title first named, but also of any title whatever to her as mortgagee in possession; and that as thus construed, the statute deprives her of property without due process of law, and impairs in an essential part, the contract embodied in the mortgage, and entered into prior to the passage of the statute.

As the case went first to the supreme court, possession as mortgagee was not averred, on the contrary, the court found that the complainant chose foreclosure, and that thereby all her other claims to the property, were merged in the foreclosure proceedings. But it is now insisted new evidence was introduced upon the new trial, showing substantially, that complainant was, prior to the passage of the act of 1872, in possession as mortgagee; and from this it is argued that the supreme court on the second hearing, must have held that the statute of 1872 had the effect of cutting off complainant's title as mortgagee in possession, as well as her title as purchaser at the foreclosure. If such be the effect of the supreme court's ruling, undoubtedly there is raised a substantial constitutional question.

I do not see in the statute itself, any such purpose; and I cannot impute to the court an interpretation that does not arise out
141 of the case before it. It is not clear to me that the court meant to hold that, in an appropriate suit in equity, the complainant's title as mortgagee in possession, would be cut off by force of the statute of 1872. Either the supreme court ruled that such title was, or was not involved in the ejectment suit. If the former, then the Federal question is already presented in the ejectment record, and its review cannot be by bill in equity in the Federal circuit courts, but by writ of error to the Supreme Court of the United States. If the latter—that is, that such title as mortgagee in possession, was not involved in the ejectment suit—then the supreme court has not passed upon the effect of the statute upon such title, as it may be asserted in equity.

The demurrer, for want of jurisdiction, will be sustained.

(Endorsed:) Filed May 22, 1902, Marshall E. Sampsell, clerk.

142 And on to-wit: the 22nd day of May, 1902, being one of the days of the regular December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to-wit:

Decree of Dismissal off May 22, 1902.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } 26070.

Now again come the parties by their solicitors, and this cause having been heretofore argued by counsel, upon the demurrer to the bill of complaint herein, and the court being now fully advised in the premises, is of the opinion that this court is without jurisdiction, and that said demurrer should be sustained,

It is thereupon considered and adjudged by the court that said demurrer be and the same is hereby sustained, and the bill herein be and the same is hereby dismissed for want of jurisdiction at the costs of the complainant.

143 And on to-wit: the 17th day of June, 1903 came the complainant in said entitled cause by her solicitors and filed in the clerk's office of said court her certain petition for appeal in words and figures following towit:

144 UNITED STATES OF AMERICA,
Seventh Judicial Circuit, Northern District of Illinois, } ss:

In the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division. In Equity.

LYDIA BRADLEY, Complainant,
vs.
H. W. LIGHTCAP, Defendant. } Gen. No. 26070.

To the United States circuit court in and for the northern district of Illinois:

Your petitioner Lydia Bradley, complainant in the above entitled cause, conceiving herself aggrieved by the decision, judgment and decree of this honorable court, entered herein May 22, 1902, in and by which it was ordered that the demurrer of the defendant to complainant's amended bill of complaint was sustained and said amended bill was dismissed for want of jurisdiction, and in and by which it was ordered, adjudged and decreed that this honorable court did not have jurisdiction of this cause;—doth hereby appeal from said

decision, judgment and decree of this honorable court to the Supreme Court of the United States, and she prays that this her appeal may be allowed and that a transcript of the record and proceedings and papers of said cause in this court, and upon
145 which said decision, judgment and final decree of this honorable court were made, be duly authenticated and sent to the Supreme Court of the United States.

Your petitioner further shows that she is advised that this cause is one that involves the construction and application of the Constitution of the United States, to wit, it involves the construction and application of section 10 of article 1 of the Constitution of the United States.

Further, said decision, final judgment and decree of this honorable court involves the construction and application of section 1 of article 14 of the Constitution of the United States, commonly called the fourteenth amendment to the Constitution of the United States.

Further, said decision, final judgment and decree of this honorable court is one in which a law of the State of Illinois, to wit, section 30 of the act of the General Assembly of Illinois, approved March 22, 1872, to take effect July 1, 1872, entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," is claimed to be in contravention of the Constitution of the United States, namely, in contravention of section 10 of article 1 of the Constitution of the United States, and also in contravention of section 1 of article 14 known as the fourteenth amendment of said Constitution.

That the matter of controversy in this cause exceeds $30,000, besides costs of suit; that this is a cause in which an ap-
146 peal may be taken from the circuit court directly to the Supreme Court under and in accordance with the provisions of the act of Congress approved March 3, 1891 entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes";—and that this cause is a cause in which under the provisions of said act there is of right an appeal to the Supreme Court of the United States from the proceedings, decision, judgment and decree of this honorable court.

And your petitioner with this her petition for an appeal files with the clerk of this court an assignment of errors which states separately and particularly each error asserted and intended to be asserted, which assignment of errors is hereto attached, and your petitioner begs leave to refer thereto as a part of this petition for greater certainty.

Wherefore your petitioner prays that her said prayer for an appeal may be allowed and her appeal to the Supreme Court of the United States herein allowed and granted to her, and that an order of this court may be entered to this effect in accordance with the statute in such case made and provided, and in accordance with the course of practice in this honorable court, and that a citation may

be issued and such other proceedings taken and allowed herein for the carrying out of said appeal as shall be in accordance with the law and the course of practice in such case.

147 And your petitioner will ever pray, etc.

JOHN S. MILLER,
MERRITT STARR,
W. W. HAMMOND,
Solicitors for Lydia Bradley, Petitioner.

LYDIA BRADLEY,
By MERRITT STARR,
Her Solicitor.

(Endorsed:) Filed June 17, 1903, Marshall E. Sampsell, clerk.

148 And on the same day to-wit: the 17th day of June, 1903, came the complainant in said entitled cause by her solicitor and filed in the clerk's office of said court her certain assignment of errors in words and figures following to-wit:

149 *Assignments of Error.*

UNITED STATES OF AMERICA,
Seventh Judicial Circuit, Northern District of Illinois, } ss:

In the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division. In Equity.

LYDIA BRADLEY, Complainant,
vs.
H. W. LIGHTCAP, Defendant. } Gen. No. 26070.

Assignment of errors.

Now comes Lydia Bradley, complainant, petitioner and appellant herein, by John S. Miller, Merritt Starr and William W. Hammond, her solicitors, and shows that in the record and proceedings, and in the rendering of the judgment and decree of the circuit court of the United States in and for the northern district of Illinois in said cause, and in the record and proceedings set forth in the transcript of the record of said court in said cause submitted herewith, there is manifest error in this, to wit:

1. That said United States circuit court in and for the northern district of Illinois erred in not rendering decision against the
150 validity of the statute of Illinois known as section 30 of an act of the General Assembly of Illinois entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree." Approved March 22, 1872, in

force July 1, 1872; also known as section 30 of chapter 77 of the Revised Stat-es of Illinois, according to the revision of 1874.

And in not holding that said statute was repugnant to the Constitution of the United States, and to section 10 of article 1 thereof;

And in not holding that said statute was void.

2. That said United States circuit court for the northern district of Illinois erred in not rendering decision against the validity of the statute of Illinois known as section 30 of an act of the General Assembly of Illinois entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872 / in force July 1, 1872; also known as section 30 of chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874;

And in not holding that said statute was repugnant to the Constitution of the United States, and to section 1 of article 14 thereof, also known as the 14th amendment to the Constitution of the United States;

And in not holding that said statute was void.

151 3. That said United States circuit court for the northern district of Illinois erred in not rendering decision against the validity of the statute of Illinois known as section 30 of an act of the General Assembly of Illinois entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree." Approved March 22, 1872, in force July 1, 1872; also known as section 30 of chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874;

And in not holding that said statute of Illinois was repugnant to the laws of the United States and to section 1979 of the Revised Statutes of the United States;

And in not holding that said statute of Illinois was void.

4. That said United States circuit court for the northern district of Illinois erred in not rendering decision and judgment and decree against the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment and decree against this petitioner and plaintiff in error;

And in not holding that said authority was repugnant to the Constitution of the United States and to section 10 of article 1 thereof;

And in not holding that said authority was void.

152 5. That said court below erred in not rendering decision, judgment and decree against the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment against this petitioner and plaintiff in error.

And in not holding that said authority was repugnant to the Constitution of the United States and to section 1 of article 14 thereof, also known as section 1 of the 14th amendment to the Constitution of the United States.

And in not holding that said authority was void.

6. That said court below erred in not rendering decision, judgment and decree against the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment against this petitioner and plaintiff in error.

And in not holding that said authority exercised under the State of Illinois and upon which said H. W. Lightcap recovered judgment was repugnant to the laws of the United States and to section 1979 of the Revised Statutes of the United States;

And in not holding that said authority was void.

7. That said court below erred in not sustaining the claim
153 of this petitioner and plaintiff in error whereby she claimed her title, right, privilege and immunity in and to the properties described in the pleadings and evidence set forth in the record in this cause, under the Constitution and laws of the United States and under section 10 of article 1 and section 1 of article 14 (also known as the 14th amendment) of said Constitution and under section 1979 of the Revised Statutes of the United States; and her claim that her said title and right are secure under said Constitution and laws of the United States and said provisions thereof, from any act or deprivation by authority of said State under said statute thereof, and in not sustaining her claim that under said Constitution and laws of the United States and said provisions thereof she has immunity in her said property from said acts and authority exercised under said State.

8. The honorable court below erred in not deciding and holding that there exists in this cause a controversy necessarily involving the construction of the Constitution of the United States and particularly section 10 of article 1 thereof as applicable to the certain statute of Illinois hereinbefore in these assignments of errors cited, and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

9. The honorable court below erred in not holding and deciding that there exists in this cause a controversy necessarily in-
154 volving and drawing in question the construction of the said section of the Constitution of the United States as applicable to the said statute of the State of Illinois as the same was theretofore construed and applied by the supreme court of Illinois as alleged in said amended bill and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

10. The honorable court below erred in not holding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America, and particularly section 1 of article 14 thereof, also known as section 1 of the 14th amendment to the Constitution of the United States, as applicable to said statute of the State of Illinois, and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

11. The honorable court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America, particularly section 1 of article 14 thereto, also known as section 1 of the 14th amendment thereof, as applicable to the said statute of the State of Illinois, as the same had theretofore been construed and applied by the supreme court of Illinois as alleged in said amended bill, and in not deciding said
155 controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

12. The honorable court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the statutes of the United States of America, and particularly section 1979 of the Revised Statutes of the United States as applicable to the said statute of the State of Illinois, and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of Illinois void.

13. The honorable court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the statutes of the United States of America, and particularly section 1979 of the Revised Statutes of the United States, as applicable to the said statute of the State of Illinois, as the same was theretofore construed and applied by the supreme court of Illinois as alleged in said amended bill, and in not deciding said controversy in favor of the contention of this petitioner and plaintiff in error, and in not holding said statute of State of Illinois void.

14. The honorable court below erred in not holding and deciding that there exists in this case a controversy necessarily involv-
156 ing and drawing in question the construction of the Constitution of the United States of America and said section 10 of article 1 and said section 1 of article 14 thereof, as applicable to the change of judicial construction of the law of mortgage contracts made by said supreme court of Illinois, subsequent to the date of your petitioner's mortgage contract by which her remedy thereunder was materially impaired.

15. The court below erred in sustaining said demurrer and dismissing complainant's amended bill.

16. The court below erred in not overruling said demurrer and requiring defendant to answer.

17. The court below erred in not holding section 30 of chapter 77 of the Revised Statutes of Illinois, being said Illinois statute of 1872 before amended, inapplicable to the mortgage contract of the complainant and to her rights to the land in possession acquired before the statute was passed.

18. The court below erred in not holding said statute of Illinois inapplicable to the suit of the complainant brought prior to the passage of said statute.

19. The court below erred in not finding and holding that the complainant had equitable title to the premises named in said bill and possession by the complainant, and for the possession of which the defendant brought said ejectment suit.

157 20. The court below erred in not finding and holding that the title of the defendant to said premises mentioned in the last preceding assignment of error had been divested by the proceedings set forth in said bill.

21. The court below erred in not finding and holding that the defendant was estopped from maintaining the proceeding in ejectment to dispossess the complainant of said premises.

22. The court below erred in not granting the motion of the complainant and enjoining the defendant from maintaining said ejectment suit.

23. The court below erred in not holding the quit claim deed to said defendant Lightcap in said amended bill mentioned a cloud upon the title of complainant.

24. The court below erred in not entering a decree compelling a conveyance of said premises by the defendant to the complainant.

25. And for that there are other manifest errors occurring in said record and proceedings.

Wherefore the said Lydia Bradley, complainant, petitioner and appellant prays the honorable Supreme Court of the United States to examine and correct the errors assigned and for a reversal of the judgment and decree of the United States circuit court in and

158 for the northern district of Illinois, entered in the above entitled cause, and prays that said honorable Supreme Court of the United States will remand said cause to the said circuit court *in* the United States in and for the northern district of Illinois, with directions to entertain said bill, to issue an injunction *pendente lite*, to rule the defendant to answer and upon the hearing thereof to adjudge and decree the equities of said cause in accordance with the merits, and in so doing to hold that said statute of Illinois is inapplicable to the mortgage, the possession and the suit of the complainant *under*, obtained and brought respectively prior to the enactment of said statute; and to hold that said statute as *constituted* by the supreme court of Illinois as in said bill *is* set forth, and the judgment and construction of said supreme court of Illinois in so construing the same is in contravention of the Constitution of the United States, as heretofore pointed out in this assignment of errors, and as pointed out in said amended bill, and is inoperative and void as against the complainant, petitioner and appellant.

JOHN S. MILLER,
MERRITT STARR,
W. W. HAMMOND,
Solicitors for Lydia Bradley, Petitioner and Appellant.

LYDIA BRADLEY,
By MERRITT STARR,
Her Solicitor.

(Endorsed:) Filed June 17, 1903, Marshall E. Sampsell, clerk.

159 And on the same day to-wit: the 17th day of June, 1903, being one of the days of the regular December term of said court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, circuit judge, appears the following entry to-wit:

Order of June 17, 1903, Allowing Appeal.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Gen. No. 26070.

Upon motion of John S. Miller, Esq., Merritt Starr, Esq. and W. W. Hammond, Esq., counsel for the complainant, and on the filing of the petition of Lydia Bradley for order allowing appeal, together with an assignment of errors, it is ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the decree entered May 22, 1902 dismissing the amended bill of complaint herein; that the amount of the bond upon said appeal be and hereby is fixed at the sum of five hundred ($500.00) dollars, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

Witness my hand and seal this 17th day of June 1903.

P. S. GROSSCUP, *Judge, etc.* [SEAL.]

160 And on the same day to-wit: the 17th day of June, 1903, came the complainant in said entitled cause by her solicitor and filed in the clerk's office of said court her certain bond on appeal in words and figures following to-wit:

161 Know all men by these presents, that we, Lydia Bradley, as principal, and John W. Walters and Harry A. Hammond, as sureties, are held and firmly bound unto H. W. Lightcap in the full and just sum of five hundred dollars ($500.00) to be paid to the said H. W. Lightcap or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of —— in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a term of the United States circuit court in and for the northern district of Illinois in the northern division in a suit depending in said court, between said Lydia Bradley as complainant and said H. W. Lightcap as respondent or defendant; said suit being a certain action or suit in equity numbered general number 26070 in the records of said court; a decree was rendered against the said Lydia Bradley for the costs of said suit and dismissing her certain suit and amended bill of complaint—and the said Lydia Bradley complainant having obtained an appeal and order

for appeal allowing the same and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said H. W. Lightcap citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Lydia Bradley shall prosecute her said appeal to effect, and answer all damages and costs if she fail to make her said plea of appeal good, then the above obligation to be void; else to remain in full force and virtue.

LYDIA BRADLEY. [SEAL.]
JOHN W. WALTERS. [SEAL.]
HARRY A. HAMMOND. [SEAL.]

Sealed and delivered in presence of—
W. W. HAMMOND.
C. E. COMSTOCK.

Approved by—
P. S. GROSSCUP.
Circuit Judge.

(Endorsed:) Filed June 17, 1903, Marshall E. Sampsell, clerk.

[Endorsed:] United States circuit court, northern dist. of Illinois, northern division. —— —— *vs.* —— ——. Bond. Copy.

162 UNITED STATES OF AMERICA, *Seventh Judicial Circuit, Northern District of Illinois, Northern Division,* } *ss:*

In the Circuit Court of the United States in and for the said Northern District of Illinois, in the Northern Division Thereof.

LYDIA BRADLEY, Plaintiff, *vs.* H. W. LIGHTCAP, Defendant. } In Equity. General No. 26070.

I, Marshall E. Sampsell, clerk of the circuit court of the United States for said northern district of Illinois and keeper of the records and seal of said court, do hereby certify the above and foregoing 161 pages of typewritten written and printed matter, numbered from 1 to 161 inclusive to be a true, correct and complete transcript of the record and proceedings in said court, in the above and therein entitled cause, as the same appear from the original records and files of said court now remaining in my custody and control. And that I have duly attached hereto the original citation under the hand of Judge P. S. Grosscup, addressed to said H. W. Lightcap, with the original return of service thereof upon said H. W. Lightcap, signed by the United States marshal, in and for said district.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the city of Chicago, in said district, this nineteenth day of June, A. D. 1903.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, *Clerk.*

163 UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. W. Lightcap, Greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to an order allowing an appeal duly entered and of record in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, in that certain action or suit in equity numbered general number 26070 in the records of said last mentioned court wherein Lydia Bradley is complainant and appellant and you are respondent and appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable P. S. Grosscup judge of the circuit court of the United States, this 17th day of June, in the year of our Lord one thousand nine hundred and three (1903).

P. S. GROSSCUP,
Circuit Judge.

164 [Endorsed:] #2846. Original. No. 26070 United States circuit court, northern district of Illinois, northern division. In equity Lydia Bradley *vs.* H. W. Lightcap Citation. Returnable —— — 190– —— —— clerk. Filed June 19" 1903 Marshall E. Sampsell clerk U. S. circuit court 3835 Elmwood Ave.

I have served this writ within my district by reading the same to and in the presence and hearing of the within named H. W. Lightcap, at the same time delivering to him personall- a true copy thereof on the 18th day of June A. D. 1903.

JOHN C. AMES,
U. S. Marshal.
WM. E. CASS, *Deputy.*

1 service	2.00
8 miles	.48
	2.48

Endorsed on cover: File No. 18,994. N. Illinois C. C. U. S. Term No. 343. Lydia Bradley, appellant, *vs.* H. W. Lightcap. Filed July 6th, 1903.

FILE COPY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1895.

No. 343. Cost, No. 18 [illegible].

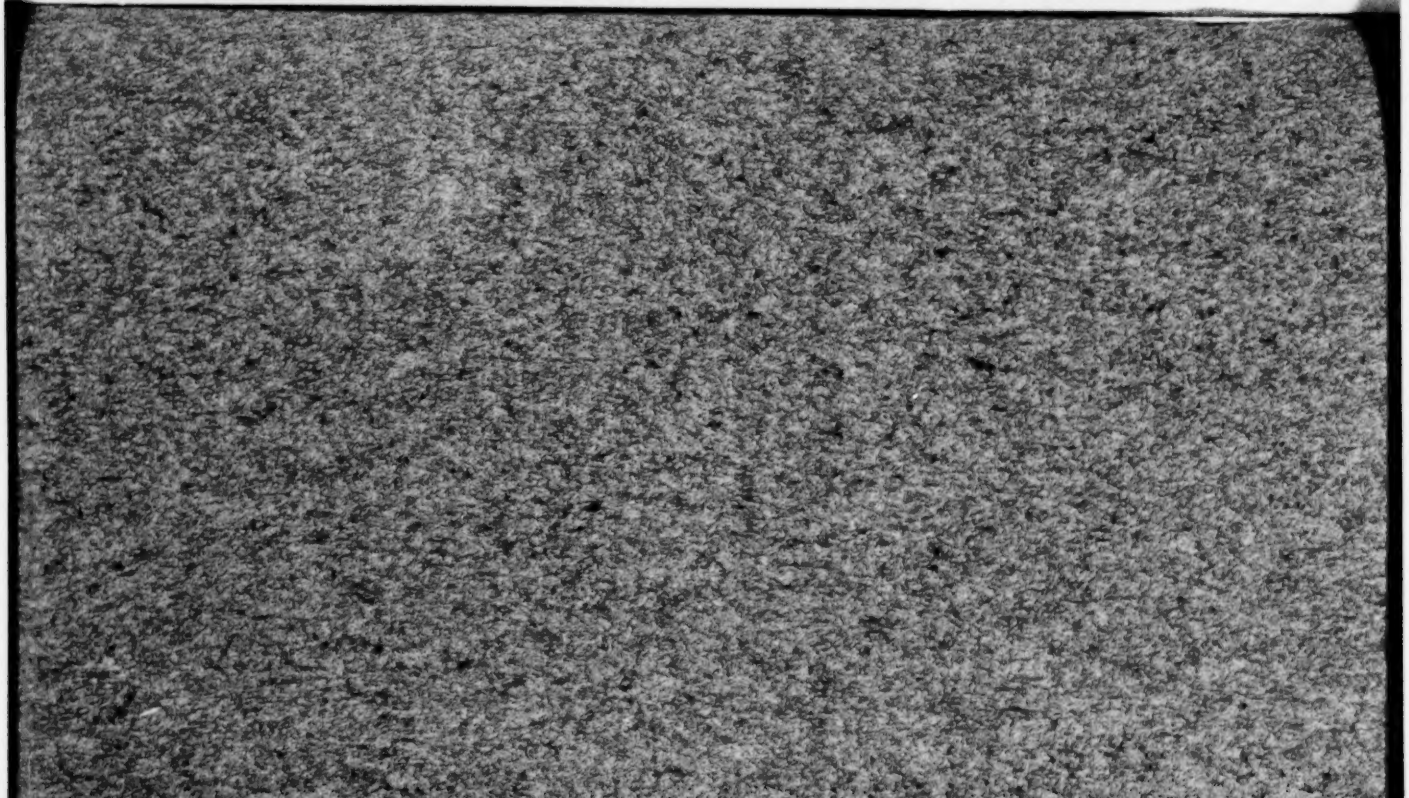
LYDIA BRADLEY, Appellant,

vs.

H. W. LOCKWOOD, Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 343. **Gen. No. 18994.**

LYDIA BRADLEY, *Appellant,*
vs.
H. W. LIGHTCAP, *Appellee.*

In Equity.

BILL TO QUIET TITLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORHERN DISTRICT OE ILLINOIS.

BRIEF FOR APPELLANT.

Appellant filed her bill in chancery in the said Circuit Court, November 12, 1901, to quiet her title, and for other relief. Appellee demurred generally, and as ground therefor denied the jurisdiction.

Appellant thereupon filed an amended bill. Appellee filed no pleading thereto.

The amended bill was supported by the affidavits of appellant and five other persons cognizant of the facts averred. (See Trans., pp. 64-77.)

May 27, 1902, said Circuit Court sustained the demurrer, and dismissed the original bill, and with it the

case, for want of jurisdiction. Both parties and court treated the demurrer as extended to the amended bill.

This record is brought here upon appeal.

STATEMENT OF CASE MADE BY AMENDED BILL.

The amended bill shows that on June 30, 1867, Mrs. Lydia Bradley, appellant, was the owner of a mortgage given by T. B. Breedlove, upon 1,200 acres of land in Mason County, Illinois, to secure a debt of $19,616. (Trans., 51.)

That Breedlove conveyed said premises, subject to said mortgage to Benjamin S. Prettyman. That said Prettyman conveyed 680 acres of said land to Absalom McCune, August 13, 1868, and took from him the same day a trust deed on said 680 acres to E. G. Johnson, trustee for appellant, to secure three notes payable to her, each for $5,000, due one, two and three years after date. (*Id.*, 52.) Said trust deed contained full covenants of warranty and condition of forfeiture upon default in payment of any part of the debt, interest or taxes. That said Prettyman then persuaded appellant's agent and delivered them to him in part payment of said Breedlove indebtedness and secured from appellant a release of all the lands not included in said McCune trust deed, being about 520 acres. (*Id.*, 52.) That afterwards, on November 13, 1868, McCune reconveyed the 680 acres to said Prettyman.

That said McCune never paid either taxes, interest or any part of said notes; that she held said notes until in 1871, when appellant discovered that McCune had left the state, after having (on November 13, 1868) reconveyed his equity of redemption to Prettyman. That thereupon she investigated and found said 680 acres to be

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swampy and worthless and vacant and unoccupied and took possession of said lands and redeemed same from tax sales and paid current taxes, and afterwards she filed a bill, February 22, 1872 (to the March Term, 1872), to set aside the release of the former mortgage on ground of fraudulent misrepresentations, and to have it reinstated and to foreclose that former mortgage. (See that bill, Ex. A, Trans., 13-22; and Prettyman's answer thereto, 22-27.) And that she, by her tenants, has remained in actual, open, visible and exclusive possession of said 680 acres of land continuously since November, 1871, to the present time, claiming to be the owner in fee, and still remains in such possession. (*Id.*, 53.)

That she continued in uninterrupted, actual, exclusive, adverse possession of said 680 acres, hostile to all the world besides, and has thence continued and still continues in such actual, exclusive and adverse possession. That in the summer of 1872 she personally entered on said lands, employed an agent to hold and look after said 680 acres, who held active possession, fenced the lands, made such use of them as their nature would permit; and, after all periods for redemption had expired, and prior to the commencement by appellee of the ejectment suits hereinafter mentioned, appellant, relying on her absolute and complete right and title to said 680 acres of land, and upon the bar and extinction of the right or equity of redemption of McCune or of those claiming under him, proceeded to drain the lands, expending about $5,000 in so doing; built valuable improvements, farm buildings, three dwelling houses, three large barns, etc., upon the land, expending about $5,000 therein. (Trans., 53, 61.) That after reclaiming the land from the swamp, she caused it to be broken (*i. e.*, with breaker-plows, for tillage, and found the soil like peat, highly inflammable,

heavily rooted with strong swamp grass; infested with wire worm, cut worm and other pests; and incapable of producing grain; that she thereupon caused the soil to be analyzed and its needs ascertained and fertilizers to be added to the soil to remedy its deficiencies; by all which means she derived no income from the land, but made large additional expenditures thereon, in the course of the years from January 27, 1881, when the Prettyman-McCune equity of redemption expired, to 1894, when their Lightcap attack upon her title began; that during that time appellant paid over $5,000 in current taxes upon the property; and by her labors and expenditures finally brought the land to a high state of cultivation, and to great value—$65 per acre. (Trans., 60, 61.)

The court, after a contest on the bill to rescind the release of and to foreclose Breedlove mortgage, declined to give her this relief, and on August 22, 1879, entered decree of foreclosure of the McCune trust deed instead, and ordered a sale thereof by master. *Id.*, 53; see copy of said decree, Ex. B, Trans., 28-31.) She, in possession, bid $10,000 at the sale, which occurred October 27, 1879, had the property struck off to her, the amount of the debt reduced thereby (leaving over $20,000 of the debt unpaid), and continued in possession. (*Id.*, 54.) McCune, the maker of the trust deed, had left the state shortly after making it, and never returned, never paid any part of the debt, and never paid any taxes.

In that suit to set aside the McCune trust deed and the release of the prior mortgage, the service upon McCune, the maker of the trust deed, was by publication merely. No personal judgment or deficiency decree was rendered; but it was expressly ordered in the decree that

the debtor remain liable for the balance. He has never returned to the state. (*Id.*, 54.) The statute of limitations against the collection of this balance is suspended by his absence; and the debt to the amount of $21,000 remains alive.

That the time allowed for redemption from said foreclosure sale expired January 27, 1881, and no redemption or offer to redeem was ever made by Prettyman or McCune or any one; nor did either of them assert any claim to said property or the possession thereof.

Prettyman lived close by, saw and had full knowledge of all these expenditures and improvements, and allowed appellant to expend said sums and make said betterments without at any time asserting any title or claim to the property or notifying her or any one else that he had any claim or interest therein. (Trans., 61, 62.) That said Johnson, trustee in said trust deed, died intestate, and later, June 11, 1894, his heirs at law, in the trust deed given by McCune covering this 680 acres, executed the power of sale which it contained, by conducting a public and duly advertised sale thereunder; that in order to prevent any adverse claim arising by said sale, appellant attended same and bid $35,000 thereat, whereupon said heirs at law struck off said lands to her and gave her an absolute deed therefor (Trans., 54), which was duly recorded.

Afterwards, November 30, 1894, Prettyman placed of record a quit claim deed, purporting to convey this 680 acres to appellee, Lightcap (Trans., 54, 55), which was made and taken without valuable consideration and with full notice of the rights and possession of appellant, and with the purpose of depriving appellant of her rights and title in said premises under a certain statute of the

State of Illinois, in force July 1, 1872, and to cloud the title of appellant to said lands. (Trans., 55.)

That afterwards on the 13th day of July, 1895, appellee, Lightcap, sued in ejectment the tenants of appellant in possession of said land, claiming to be the owner in fee. That said ejectment cases were consolidated and appellant admitted to defend, and a change of venue taken to Fulton County where the trial was had, resulting in judgment for appellant. But this judgment was reversed and the cause remanded by the Supreme Court of Illinois at its October Term, 1898, and after two rehearings the opinion of the Supreme Court was filed October 19, 1900, adhering to its judgment reversing said judgment and remanding said cause for further proceedings in accordance with the views expressed in said opinion, which is attached to the bill of complaint. (Print. Trans., 32-46.)

That the question in controversy in said litigation was the construction and effect of the Statute of 1872 (Sec. 30, Chap. 77, Rev. Stat. Ill., set out in full below in statement of questions involved).

That the statute thus construed by the court as divesting her of all right, title or interest to said premises by reason of her failure to take out a master's deed on the certificate of purchase was enacted after the date of her mortgage deed. That at the date of said trust deed the statute of 1845 was in force, and there was no time limited within which a holder of a certificate of purchase must take out a deed.

That said Supreme Court of Illinois in construing and applying said statute have given it an *ex post facto* effect, contrary to the Federal Constitution, and have given force and effect to the language of said statute

which annuls the title vested in appellant, so that she is unable longer to defend said actions at law.

That the law of the land as established by the decisions of courts of last resort at the date of her mortgage contract was that a mortgagee, after breach of condition, was the real owner, while the mortgagor had only an equity of redemption; and upon the expiration of the period of redemption the mortgagor's title was extinguished, and thereafter he could not question the title and right of possession of appellant. But that said statute of 1872, purports to annul the certificate of purchase given her by said master, which, the Supreme Court of Illinois holds, terminates the title acquired prior to its enactment; and the said Supreme Court has enforced said provision of said statute contrary to Section 10, Article 1, and to Sections 1 and 5 of the Fourteenth Amendment of the Federal Constitution, and that the matter in dispute exceeds in value, exclusive of interests and costs, the sum or value of $2,000.

That upon the trial of said ejectment cases under said remanding order appellant was unable to prove that she had secured a deed from the master in chancery, as provided by said statute, and the jury was instructed to and did find her guilty, and that appellee was the owner in fee of the land, and judgment was entered against her.

That thereupon she took a new trial under the Practice Act of said state, and said cause stood for trial *de novo*, at the next May Term of said Circuit Court. That she is unable to present any other or further proof of her title than as herein alleged, and under the rulings of said Supreme Court of Illinois, construing and applying said act of 1872 to deprive her of her vested property and contract right, the result of such trial must necessarily be

adverse to her and result in a judgment from which she could not obtain relief unless this court shall grant the relief prayed, this will not constitute a legal defense, and she is about to lose her said property beyond recovery, unless the claim of said Lightcap be quieted and her equitable title established.

The Supreme Court of Illinois held, that by the retroactive statute enacted March 22, 1872, a month after suit brought, to take effect July 1, 1872, eight months in fact after possession taken, all of Mrs. Bradley's title and rights passed into the certificate of purchase; and that by not taking out a master's deed under the retroactive statute, which took effect July 1, 1872, she ceased to hav any title at all (Trans., 56-58; copy of Opinion, Ex. C, Trans., 32-46), and Prettyman, without any redemption or payment, had become reinvested with a perfect title, which he had rightfully conveyed to appellee, Lightcap.

The prayers of the amended bill are as follows:

(1) for answer;

(2) for decree compelling conveyance by defendant to complainant;

(3) for injunction enjoining defendant;

(*a*) from asserting ownership; or

(*b*) taking possession of the land;

(*c*) dispossessing complainant; or

(*d*) denying complainant's title;

and alternatively;

(*e*) from prosecuting his ejectment suit;

(4) that the deed from Prettyman to Lightcap be ordered surrendered for cancellation;

(5) that said deed be canceled;

(6) that said deed be decreed to be a cloud on complainant's title;

(7) that her rights in the premises be confirmed and established by decree;

(8) that she be confirmed in her possession by decree;

(9) prayer for temporary injunction (as in 3, above);

(10) prayer for other relief;

(11) prayer for subpœna.

QUESTIONS INVOLVED.

The question is, Did the bill of complaint present a case within the jurisdiction of the Federal Circuit Court? We maintain that it did.

1. The Circuit Court of the United States had original jurisdiction of the case as one arising under the United States Constitution, Art. 1, Sec. 10.

2. It also had jurisdiction of the case as one arising under Article Fourteen thereof, known as the Fourteenth Amendment thereto, Sec. 1.

3. And the suit was authorized by Section 1979, Rev. Stat., United States, as follows:

> "Every person who, under color *of any statute,* ordinance, regulation, custom or usage *of any state* or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights,* privileges or immunities *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, *suit in equity,* or other proper proceeding for redress."

The decision of the Illinois Supreme Court, construing the statute of the State of Illinois, under color of which the deprivation in this case is attempted, is found at pages 32 to 46 of the printed transcript, and in *Bradley* v. *Lightcap,* 186 Ill., 510.

The statute so construed and applied to impair the contract and vested rights of appellant is Section 30 of Chapter 77, Rev. Stat. Illinois, which, after providing for continuing the right of any mortgagor or his grantees to redeem from any foreclosure for twelve months after the sale, and for the issuing by the officer making the sale of

a certificate of purchase to the purchaser, provides as follows:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed." Approved, March 22, 1872. In force July 1, 1872.

The "rights, privileges and immunities," secured by the Constitution of the United States are the equitable title and right of possession of appellant in the lands mentioned in the bill, which are about to be taken away from her by a decision construing this statute, and impairing the obligation of her contract, and without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution.

4. The decision of the Supreme Court of Illinois is itself obnoxious to the Federal Constitution.

First, because it gives to said Statute of 1872, an *ex post facto* effect, as applied to the mortgage contract out of which the certificate of purchase arose, thereby impairing the obligation of that contract.

Second, because it changes the law of the land relative to mortgages, subsequently to the date of the mortgage, so as to deprive appellant of an equitable title and right of possession, which had become vested in her upon breach of condition of said mortgage prior to such change of the law of the land.

STATEMENT OF ERRORS RELIED UPON, ATTACHED TO PETITION FOR APPEAL.

(Printed Trans., pp. 81-85.)

1. That said United States Circuit Court in and for the Northern District of Illinois erred in not rendering decision against the validity of the statute of Illinois, known as Section 30 of an act of the General Assembly of Illinois, entitled, "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree." Approved, March 22, 1872, in force July 1, 1872; also known as Section 30 of Chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874.

And in not holding that said statute was repugnant to the Constitution of the United States, and to Section 10 of Article 1 thereof;

And in not holding that said statute was void.

2. That said United States Circuit Court for the Northern District of Illinois erred in not rendering decision against the validity of the statute of Illinois, known as Section 30 of an act of the General Assembly of Illinois, entitled, "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved, March 22, 1872, in force July 1, 1872; also known as Section 30 of Chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874;

And in not holding that said statute was repugnant to the Constitution of the United States, and to Section 1

of Article 14 thereof, also known as the Fourteenth Amendment to the Constitution of the United States;

And in not holding that said statute was void.

3. That said United States Circuit Court for the Northern District of Illinois erred in not rendering decision against the validity of the statute of Illinois, known as Section 30 of an act of the General Assembly of Illinois, entitled, "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree." Approved, March 22, 1872, in force July 1, 1872; also known as Section 30 of Chapter 77 of the Revised Statutes of Illinois, according to the revision of 1874.

And in not holding that said statute of Illinois was repugnant to the laws of the United States, and to Section 1979 of the Revised Statutes of the United States;

And in not holding that said statute of Illinois was void.

4. That said United States Circuit Court for the Northern District of Illinois erred in not rendering decision and judgment and decree against the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment and decree against this petitioner.

And in not holding that said authority was repugnant to the Constitution of the United States, and to Section 10 of Article 1 thereof;

And in not holding that said authority was void.

5. That said court below erred in not rendering decision, judgment and decree against the validity of

the authority exercised under the State of Illinois in said cause, and by virtue of which authority said H. W. Lightcap recovered said judgment against this petitioner.

And in not holding that said authority was repugnant to the Constitution of the United States, and to Section 1 of Article 14 thereof, also known as Section 1 of the Fourteenth Amendment to the Constitution of the United States.

And in not holding that said authority was void.

6. That said court below erred in not rendering decision, judgment and decree against the validity of the authority exercised under the State of Illinois in said cause, and by virtue of which authority, said H. W. Lightcap recovered said judgment against this petitioner.

And in not holding that said authority exercised under the State of Illinois and upon which said H. W. Lightcap recovered judgment was repugnant to the laws of the United States and to Section 1979 of the Revised Statutes of the United States.

And in not holding that said authority was void.

7. That said court below erred in not sustaining the claim of this petitioner whereby she claimed her title, privilege and immunity in and to the properties described in the pleadings and evidence set forth in the record in this cause, under the constitution and laws of the United States and under Section 10, Article 1, and Section 1, Article 14 (also known as the fourteenth amendment) of said constitution and under Section 1979 of the Revised Statutes of the United States; and her claim that her said title and right are secure under said constitution and laws of the United States and provisions thereof, from any act or depriva-

tion by authority of said state under said statute thereof, and in not sustaining her claim that under said constitution and laws of the United States and said provisions thereof she has immunity in her said property from said acts and authority exercised under said state.

8. The Honorable Court below erred in not deciding and holding that there exists in this cause a controversy necessarily involving the construction of the Constitution of the United States, and particularly Section 10 of Article 1 thereof, as applicable to the certain statute of Illinois, hereinbefore in these assignments of errors cited, and in not deciding said controversy in favor of the contention of this petitioner, and in not holding said statute of Illinois void.

9. The Honorable Court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the said section of the Constitution of the United States as applicable to the said statute of the State of Illinois as the same was theretofore construed and applied by the Supreme Court of Illinois, as alleged in said amended bill, and in not deciding said controversy in favor of the contention of this petitioner, and in not holding said statute of Illinois void.

10. The Honorable Court below erred in not holding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America, and particularly Section 1 of Article 14 thereof, also known as Section 1 of the Fourteenth Amendment to the Constitution of the United States, as applicable to said statute of the State of Illinois, and in not deciding said controversy in favor of the contention of this petitioner, and in not holding said statute of Illinois void.

11. The Honorable Court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America, particularly Section 1 of Article 14 thereto, also known as Section 1 of the Fourteenth Amendment thereof, as applicable to the said statute of the State of Illinois, as the same had theretofore been construed and applied by the Supreme Court of Illinois, as alleged in said amended bill, and in not deciding said controversy in favor of the contention of this petitioner, and in not holding said statute of Illinois void.

12. The Honorable Court below has erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the statutes of the United States of America, and particularly Section 1979 of the Revised Statutes of the United States as applicable to the said statute of the State of Illinois, and in not holding said controversy in favor of the contention of this petitioner, and in not holding said statute of Illinois void.

13. The Honorable Court below erred in not holding and deciding that there exists in this cause a controversy necessarily involving and drawing in question the construction of the statutes of the United States of America, and particularly Section 1979 of the Revised Statutes of the United States, as applicable to the said statute of the State of Illinois, as the same was theretofore construed and applied by the Supreme Court of Illinois, as alleged in said amended bill, and in not deciding said controversy in favor of the contention of this petitioner, and in not holding said statute of the State of Illinois void.

14. The Honorable Court below erred in not holding and deciding that there exists in this case a controversy necessarily involving and drawing in question the construction of the constitution of the United States of America and said Section 10 of Article 1 and said Section 1, Article 14, thereof, as applicable to the change of judicial construction of the law of mortgage contracts made by said Supreme Court of Illinois, subsequent to the date of your petitioner's mortgage contract by which her remedy thereunder was materially impaired.

15. The court below erred in sustaining said demurrer and dismissing complainant's bill.

16. The court below erred in not overruling said demurrer and requiring defendant to answer.

17. The court below erred in not holding Section 30, Chapter 77 of the Revised Statutes of Illinois, being said Illinois statute of 1872 before amended, inapplicable to the mortgage contract of the complainant and to her rights to the land in possession acquired before the statute was passed.

18. The court below erred in not finding and holding that the complainant had equitable title to the premises named in said bill and possession by the complainant, and for the possession of which the defendant brought said ejectment suit.

19. The court below erred in not finding and holding that the title of the defendant to said premises mentioned in the last preceding assignment of error had been divested by the proceedings set forth in said bill.

20. The court below erred in not granting the motion of the complainant and enjoining the defendant from maintaining said ejectment suit.

21. The court below erred in not holding the quit-claim deed to said defendant Lightcap in said amended bill mentioned a cloud upon the title of complainant.

22. The court below erred in not entering a decree compelling a conveyance of said premises by the defendant to the complainant.

BRIEF OF POINTS AND AUTHORITIES.

I.

THIS SUIT SEEKS TO ESTABLISH AND PROTECT APPELLANT'S CONTRACT RIGHTS, AND HER ESTATE IN LAND ACQUIRED THEREUNDER, AND HER POSSESSION AND RIGHT OF POSSESSION OF SUCH LAND, AGAINST IMPAIRMENT AND DEPRIVATION BY FORCE OF A STATUTE OF A STATE, IN VIOLATION OF THE FEDERAL CONSTITUTION. IT THEREFORE ARISES UNDER THE CONSTITUTION.

City Ry. Co. v. *Citizens' R. R. Co.*, 166 U. S., 557.

Walla Walla v. *Walla Walla W. Co.*, 172 U. S., 1.

Yazoo, etc., Ry. Co. v. *Adams*, 180 U. S., 1, 26 and 28.

Vicksburg Water Works v. *Vicksburg*, 185 U. S., 65.

II.

THE UNITED STATES CIRCUIT COURT HAS JURISDICTION TO PROTECT A CITIZEN AGAINST CHANGES OF LAW BY JUDICIAL DECISION DESTROYING VESTED RIGHTS OR IMPAIRING CONTRACTS ENTERED INTO IN RELIANCE ON THE LAW AS IT STOOD PREVIOUS TO THE CHANGE.

A CASE CALLING FOR THE EXERCISE OF SUCH JURISDICTION IS ONE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

THIS IS SUCH A CASE.

Burgess v. *Seligman*, 107 U. S. (17 Otto), 20.

Buncombe Co. Comrs. v. *Tommey*, 115 U. S., 122, 127 (per Mr. Justice HARLAN).

Pana v. *Bowler*, 107 U. S., 541.

Comrs. v. *Thayer*, 94 U. S. (4 Otto), 631, at 642.

Clerk v. *Bever*, 139 U. S., 96, at 117 (per Mr. Justice HARLAN).

Folsom v. *Ninety Six*, 159 U. S., 611, 625.

Ill. Central R. Co. v. *Adams*, 180 U. S., 28, 35-36.

And see:

Rowan v. *Runnels*, 5 How., 134.

State Bank of Ohio v. *Knoop*, 16 How., 369.

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 416, at 432.

Pease v. *Peck*, 18 How., 595.

Jefferson Branch Bank v. *Skelly*, 1 Black, 436.

This jurisdiction distinguishes this bill from that filed in the State Court.

Central Land Co. v. *Laidley*, 159 U. S., 103.

The former rule of property in Illinois under which appellant took the mortgage estate of which she is about to be deprived, and the decision changing that law directly in her case and authorizing the defendant to dispossess her, and against which she invokes Federal relief, are stated in Point V, *infra*.

III.

DIVERSITY OF CITIZENSHIP IS NOT NECESSARY TO CONFER FEDERAL JURISDICTION WHERE THE BILL SHOWS THAT BY LEGISLATION AND JUDICIAL DECISION OF THE STATE SUBSEQUENT TO THE VESTING OF COMPLAINANT'S CONTRACT RIGHTS, SUCH CONTRACT RIGHTS WILL BE DIVESTED OR IMPAIRED IN BREACH OF THE FEDERAL CONSTITUTION.

City Railway Co. v. *Citizens' Railroad Co.*, 166 U. S., 557.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

Yazoo & Miss. Valley Ry. Co. v. *Adams*, 180 U. S., 1 and 26 (three cases).

Ill. Cent. R. R. Co. v. *Adams*, 180 U. S., 28.

Vicksburg Waterworks v. *City of Vicksburg*, 185 U. S., 65.

Smyth v. *Ames*, 169 U. S., 466, at 516.

Riverside & A. Ry. Co. v. *City of Riverside*, 118 F. R., 736.

And the jurisdiction vested upon this ground, extended to every question in the case.

Osborn v. *Bank*, 22 U. S. (9 Wheat.), 738.

Mayor v. *Cooper*, 73 U. S. (6 Wall.), 247.

Tenn. v. *Davis*, 100 U. S., 257.

Penn Mut. Ins. Co. v. *Austin*, 168 U. S., 685.

Gregory v. *Van Ee*, 160 U. S., 643, at 646.

Railroad Co. v. *Mississippi*, 102 U. S., 135, at 140, 141.

Said judicial decision must be understood (for the purpose of testing it by the federal constitution) to be the declared law of the state directly applying to the rights

of the parties in the case, and the statute in like manner must be understood to mean what the courts of last resort of the state have construed it to mean.

Bell v. *Morrison*, 26 U. S. (1 Pet.), 351.
D'Wolf v. *Rabaud*, 26 U. S. (1 Pet.), 476.
Van Rensselaer v. *Kearney*, 52 U. S. (11 How.), 297.
Tioga R. Co. v. *Blossburg & C. R. Co.*, 87 U. S. (20 Wall.), 137.
Townsend v. *Todd*, 91 U. S., 452.
Scipio v. *Wright*, 101 U. S., 665.
Wilson v. *N. Carolina*, 169 U. S., 586.

And impairment by judicial construction of a statute is just as much prohibited as by legislative words.

Butz v. *Muscatine*, 75 U. S. (8 Wall.), 575.
Chicago v. *Sheldon*, 76 U. S. (9 Wall.), 50.
Louisiana v. *Pilsbury*, 105 U. S., 278, at 295.
Gelpcke v. *Dubuque*, 68 U. S. (1 Wall.), 175.

And where the law has not been settled, or as here, has been first settled the other way, and the question is originally presented in the Federal Circuit Court, whose judgment is brought up for review, and the earlier law of the state has entered into and become part of the obligation of the contract made in reliance thereon, this Court will compel adherence to such earlier rule in the suit arising out of such contract, notwithstanding the subsequent change of decision by the Supreme Court of the state.

Burgess v. *Seligman*, 107 U. S., 20.
Pana v. *Bowler*, 107 U. S., 529, at 541.
Buncombe Co. Comrs. v. *Tommey*, 115 U. S., 122, 127 (per Mr. Justice HARLAN).
Comrs. v. *Thayer*, 94 U. S., 631, at 642.

Clark v. *Bever*, 139 U. S., 96, at 117 (per Mr. Justice HARLAN).

Folsom v. *Ninety-six*, 159 U. S., 611, 625.

THE FEDERAL JURISDICTION OF THE BILL TO REMOVE A CLOUD, TO QUIET THE TITLE, AND COMPEL A CONVEYANCE IS INDISPUTABLE.

Alexander v. *Pendleton*, 12 U. S. (8 Cranch.), 462.

Ruckman v. *Cory*, 129 U. S., 387.

Mills v. *Lockwood*, 42 Ill., 111-118.

Wilson v. *Byers*, 77 Ill., 76-84.

Wehrman v. *Conklin*, 155 U. S., 314.

Clark v. *Smith*, 38 U. S., 119 (13 Pet., 195).

Holland v. *Challen*, 110 U. S., 15.

Reynolds v. *Crawfordsville Bank*, 112 U. S., 405.

Chapman v. *Brewer*, 114 U. S., 158.

Gormley v. *Clark*, 134 U. S., 338.

Sharon v. *Tucker*, 144 U. S., 533.

Roberts v. *N. P. R. Co.*, 158 U. S., 1.

If appellant has an equitable title, a court of equity will enjoin proceedings at law and direct the cause to proceed in equity for settlement of the title.

Ruckman v. *Cory*, 129 U. S., 387.

Mills v. *Lockwood*, 42 Ill., 111 (118).

Wilson v. *Byers*, 77 Ill., 76 (84).

Smith v. *Spencer*, 73 Ala., 299.

McKibbin v. *Bristol*, 50 Mich., 319.

Pollock v. *Gilbert*, 16 Ga., 398.

Pierson v. *Ryerson*, 5 N. J. Eq., 196.

Carpenter v. *Montgomery*, 80 U. S. (13 Wall.), 480.

Barnett v. *Cline*, 60 Ill., 205.

Reed v. *Reber*, 62 Ill., 240.

IV.

Appellant's title and the cloud of appellee arise as follows:

McCune to Johnson, trustee: Trust deed of mortgage (with full covenants of title), August 13, 1868.

McCune to Prettyman: Conveyance of equity of redemption, November 30, 1868.

Default and entry for Mrs. Bradley, mortgagee, November, 1871. (Tr., pp. 53, 65, 75, 6.)

Foreclosure sale to Mrs. Bradley, October 27, 1879.

Prettyman to Lightcap, quitclaim deed, November 30, 1894.

The cloud is this last-mentioned quitclaim deed, by the mortgagor's grantee, made after appellant had had the equitable title, had held possession, and had paid taxes for twenty-three years.

It carried only what the mortgagor had to give; and the mortgagor had nothing to give. Any after-acquired title of said mortgagor passed by his original covenants of title to appellant.

But this cloud is raised through the color given to it by the state court's decision, into what it calls the real title to the property. And this decision is in breach of the constitution.

V.

THE ILLINOIS LAW OF MORTGAGES APPLICABLE HERETO, AS IT EXISTED WHEN THIS MORTGAGE WAS MADE,—AND THE CHANGE THEREIN, BY WHICH APPELLANT'S CONSTITUTIONAL RIGHTS ARE IMPAIRED,—SET OUT AND EXPLAINED.

The English common law of mortgage was adopted in Illinois.

A mortgage is a conditional conveyance of the fee. After condition broken, the title becomes absolute in the mortgagee, who may recover possession as against the mortgagor, and the mortgagor has only an equity of redemption.

Such was the law of the state as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case.

Williams v. *Brunton*, 3 Gilm., 600 (622).
Kruse v. *Scripps*, 11 Ill., 98 (104).
Carroll v. *Ballance*, 26 Ill., 9 (16).
Chickering v. *Failes*, 26 Ill., 507 (519).
Nelson v. *Pinegar*, 30 Ill., 473 (481).
Griffin v. *M. Co.*, 52 Ill., 130 (145).
Kenyon v. *Shreck*, 52 Ill., 382 (386).
Kelgour v. *Wood*, 64 Ill., 345 (348).

And so the law of Illinois remained after said date, and still remains, and is enforced in cases where said statute of 1872 does not apply.

Kelgour v. *Wood*, 64 Ill., 345 (348).
Vallette v. *Bennett*, 69 Ill., 622 (635).
Harper v. *Ely*, 70 Ill., 581 (585).
Davis v. *Conn. Mut. Co.*, 84 Ill., 508 (510).

Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).
Smith v. *Mace*, 137 Ill., 68 (74).
Esker v. *Heffernan*, 159 Ill., 38 (40).
Walker v. *Warner*, 179 Ill., 16 (23).
Ware v. *Schintz*, 190 Ill., 189 (193).
Farrar v. *Payne*, 73 Ill., 83 (88).
Stone v. *Tyler*, 173 Ill., 147 (155).

What was the law of the land in the State of Illinois as to the title of the mortgagee after condition broken at the date of the McCune mortgage?

Carroll v. *Ballance*, 26 Ill., 9, is considered a ruling case upon this question. Mr. Justice BREESE in that case said (p. 16):

> "The questions presented by this record are: Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgaged premises in ejectment against the mortgagor, or those claiming under him, when one or more notes are due and unpaid, and without notice to quit to the party in possession before action brought?"

The English law is then reviewed at some length, and the conclusion reached is expressed in the following language (p. 20):

> "We think it is settled that a mortgagee may maintain ejectment on condition broken without notice to quit, and that the condition is broken when one or more installments are due and unpaid; because the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition."

In *Chickering* v. *Failes*, 26 Ill., 507 (519), the court says:

> "By the mortgage deed the legal title passes to the mortgagee, but in equity the right of redemption

remains in the mortgagor, even after the condition broken. But at law, after condition broken, the mortgagee may bring ejectment and recover possession. The mortgage is a deed of conveyance with a condition annexed, and purports on its face to convey the title, but the condition authorizes the mortgagor to defeat the title thus conveyed and to reinvest it in himself by a performance of the condition. After a failure to perform the condition the title apparently becomes absolute in the mortgagee, and is clearly color of title."

In *Mulvey* v. *Gibbons*, 87 Ill., 367 (382), the court says:

"At the date of the decree (a decree *nisi* in strict foreclosure), and for a considerable time afterward, the property was worth very much less than the amount due of the mortgage debt. The decree determined the rights of the parties, that unless the amount due was paid within thirty days the defendants should be debarred from all equity of redemption of the premises. There is no pretense of the payment of any part of the money, or of excuse for non-payment, or of any readiness or disposition to pay anything. Why, in reason and justice, should not the right of redemption be barred as the decree declared?

"The absence of a further order of confirmation was here a lack of but the merest technical form. According to the rule as laid down by Daniell, if the defendants did not pay the money the plaintiffs' rights to the property became absolute, though in order to complete his title there must have been a final order confirming it.

"If the plaintiffs' right to the property had become absolute, how, before a court of equity, could that consist with any remaining right of redemption in these defendants? Why, in that court, where the real right, regardless of form, is regarded and given effect to, should not an absolute right, as thus declared, be recognized and asserted?

"In *Kenyon* v. *Shreck*, 52 Ill., 383, this court recognize and declare the principle that the right of

a mortgagor or his grantee to redeem after condition broken is a purely equitable right, which can be asserted only in a court of equity, and when its assertion would be plainly inequitable, that court will withhold its aid; and that where a defective foreclosure has been had, such equity of redemption will not be permitted to be asserted against an equity still stronger. And see *Hamilton* v. *Lubekee*, 51 Ill., 420; *Munn* v. *Burges*, 70 *Id.*, 604; *Bush* v. *Sherman*, 80 *Id.*, 160."

Many other quotations to the same effect could be made from authorities cited above.

The *cestui que trust* in a trust deed, after condition broken, is, in equity, the absolute owner of the title, just as at law the trustee is. Consequently plaintiff in error, as *cestui que trust* in the trust deed to Johnson, after breach of condition, will be considered in equity the absolute owner of the title and right of possession, as she would at law had she been the mortgagee. Am. and Eng. Ency. of Law, 1st Ed., Vol. 27, page 234, and cases there cited.

Croxall v. *Shererd*, 72 U. S. (5 Wall.), 268.
Lewin on Trusts and Trustees, p. 674.
Nicoll v. *Walworth*, 4 Denio, 386.
Badgett v. *Keating*, 31 Ark., 400.

By the law of Illinois, as promulgated and enforced by the courts of last resort at and prior to the date of said mortgage contract, if the mortgagor and his grantees failed to redeem the mortgaged premises from foreclosure sale within the time limited by the statute, and the decree of foreclosure, his equity of redemption was barred and foreclosed, and thereafter he had no further title to the premises.

Burgett v. *Osborne*, 172 Ill., 227 (238).
Bozarth v. *Largent*, 128 Ill., 95 (107).
Smith v. *Mace*, 137 Ill., 68 (73).

Stephens v. *Ill. Mut. Fire Ins. Co.*, 43 Ill., 327 (331).
Jones on Mortgages, Vol. 2, Sec. 1661.
Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Massey v. *Westcott*, 40 Ill., 160 (163).
Herdman v. *Cooper*, 138 Ill., 583 (587).
Lucas v. *Nichols*, 66 Ill., 41 (43).
McLagan v. *Brown*, 11 Ill., 519 (522-3).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).

By said law of Illinois as it existed at the date of the mortgage contract, the equity of redemption of said McCune and his grantee, Prettyman, was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of the sale to appellant (Rev. Stat., Ill., 1845; Sec. 13; Chap. 57), and by the express provisions of the decree of foreclosure the defendants McCune and Prettyman and all persons claiming under them since the commencement of the foreclosure suit February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within twelve months after October 27, 1879. And by the repeated decisions of the courts of last resort of said State of Illinois it had become a fixed rule of property at and prior to the date of said mortgage that the mortgage conveyed the fee, subject to conditional defeasance; that after condition broken the title became absolute in the mortgagee who was entitled to recover possession of the premises.

The final order and decree of the Supreme Court of Illinois in this case, in construing and applying the statute of 1872, which was passed since our mortgage was made, establishes a different rule of law, to wit:

That the title of the mortgagor is not completely divested by the foreclosure and sale and expiration of the period of redemption, but is continued and enlarged into a fee simple, five years afterward, and that the title of the mortgaged premises did not become absolute in the mortgagee, but that all her right, title and interest ceased January 27, 1886, unless she sooner secured a deed from the master in chancery, and that the mortgagee is not longer entitled to hold possession as against the mortgagor and his assigns.

The application of this new rule to the pre-existing mortgage is unconstitutional. See Parts I, V and VI.

VI.

THE CONSTRUCTION GIVEN THE STATUTE BY THE DECISION OF THE STATE SUPREME COURT IMPAIRS THE OBLIGATION OF THE CONTRACT.

The law of the land, as recognized and enforced by the courts, providing means of enforcement of contracts, becomes a part of the contract the same as though included in its terms; and a change in such law, after a contract has been made or title vested thereunder, by which change the obligation of such contract is impaired or such title is divested, is a law impairing the obligation of contracts, and if accomplished by a statute of a state, is obnoxious to Section 10 of Article 1 of the Constitution of the United States.

Bronson v. *Kinzie*, 42 U. S. (1 How.), 311 (319).

Tennessee v. *Sneed*, 96 U. S., 69.

Edwards v. *Kearzey*, 96 U. S., 595.

Louisiana v. *New Orleans*, 102 U. S., 203.

Walker v. *Whitehead*, 83 U. S. (16 Wall.), 314.
Barnitz v. *Beverly*, 163 U. S., 118.
Seibert v. *Lewis*, 122 U. S., 284.
Gunn v. *Barry*, 15 Wall., 610.
Shapleigh v. *San Angelo*, 167 U. S., 646 (657).
Ogden v. *Saunders*, 25 U. S. (12 Wheat.), 213 (257).
McCracken v. *Hayward*, 43 U. S. (2 How.), 608 (617).
Butz v. *City of Muscatine*, 75 U. S. (8 Wall.), 575, at 583.
1 Jones on Mortgages, 5th Ed., Sec. 27.
Gantly's Lessee v. *Ewing*, 44 U. S. (3 How.), 707, 717.
Von Hoffman v. *Quincy*, 71 U. S. (4 Wall.), 535.
Green v. *Biddle*, 21 U. S. (8 Wheat.), 1, at 84.
Field v. *Brokaw*, 148 Ill., 654.

THE APPLICATION OF THE RULE TO THE FACTS HERE.

Carroll v. *Ballance*, 26 Ill., 9.
Rucker v. *Dooley*, 49 Ill., 377 (1868).
Barnitz v. *Beverly*, 163 U. S., 118.
Butz v. *Muscatine*, 75 U. S. (8 Wall.), 575.
Chicago v. *Sheldon*, 76 U. S. (9 Wall.), 50.
Louisiana v. *Pilsbury*, 105 U. S., 278, at 295.
Smyth v. *Ames*, 169 U. S., 466.
Bronson v. *Kinzie*, 42 U. S. (1 How.), 311.
Walker v. *Whitehead*, 83 U. S. (16 Wall.), 314, 317.
Wilson v. *North Carolina*, 169 U. S., 586.
Ryhiner v. *Frank*, 105 Ill., 326.
Peterson v. *Emmerson*, 135 Ill., 55.
Brown v. *Ridenhower*, 161 Ill., 239.
Lightcap v. *Bradley*, 186 Ill., 510.

VII.

THE CONSTRUCTION GIVEN THE STATUTE OF ILLINOIS BY THE ILLINOIS SUPREME COURT IN 186 ILL., 510, DEPRIVES THE APPELLANT OF HER PROPERTY WITHOUT DUE PROCESS OF LAW.

IT VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Cases stating the previous rule of Illinois law.

Carroll v. *Ballance*, 26 Ill., 9.
Chickering v. *Failes*, 26 Ill., 507, 519.
Mulvey v. *Gibbons*, 87 Ill., 367, 382.
Esker v. *Heffernan*, 159 Ill., 38, 40.
Williams v. *Brunton*, 3 Gilm. (Ill.), 600, 602.
Mills v. *Lockwood*, 42 Ill., 111.
Wilson v. *Byers*, 77 Ill., 76.

The change of law is not allowed to divest vested rights.

C., B. & Q. Ry. Co. v. *Chicago*, 166 U. S., 226.
Bank of Kentucky v. *Stone*, 174 U. S., 799, affirming s. c., 88 Fed. Rep., 383.
Scott v. *McNeal*, 154 U. S., 34.
Virginia v. *Rives*, 100 U. S., 313, 318, 319.
Ex parte Virginia, 100 U. S., 339, 346-7.
Neal v. *Delaware*, 103 U. S., 370, 397.
Yick Wo v. *Hopkins*, 118 U. S., 356.
Henderson v. *New York*, 92 U. S. (2 Otto), 259.
Chy Lung v. *Freeman*, 92 U. S. (2 Otto), 275.
Santa Clara Co. v. *S. P. R. Co.*, 18 F. R., 385, 397-99; s. c., 118 U. S., 394.

Smyth v. *Ames*, 169 U. S., 466.

Covington Turnpike Co. v. *Sandford*, 164 U. S., 578.

Barrow S. S. Co. v. *Kane*, 170 U. S., 100, at 111.

Findal v. *Wesley*, 167 U. S., 204, at 222.

And see cases cited under Point I above.

The legislation to carry the Fourteenth Amendment into effect sustains this remedy.

Live Stock, etc., Assn. v. *Crescent City Co.*, 1 Abb. (U. S.), 388; 15 Fed. Cas., p. 649 (decided June 10, 1870).

Tuckman v. *Welch*, 42 F. R., 548 (1890).

Schandle Bottling Co. v. *Welch*, 42 F. R., 561.

Terre Haute & I. R. Co. v. *Peoria & P. R. Co.*, 82 Fed. R., 943.

Holt v. *Indiana Mfg. Co.*, 176 U. S., 68.

Holden v. *Hardy*, 169 U. S., 366, 385.

VIII.

THE INJUNCTION PRAYED BY COMPLAINANT'S BILL IS NOT ESSENTIAL TO THE RELIEF SOUGHT.

THE PRAYER FOR INJUNCTION DOES NOT DEFEAT THE JURISDICTION OF THE COURT.

1 Daniell Ch. Pr., 5th Ed., * * * 583-4.

Livingston v. *Story*, 9 Peters, 632, 658.

Hunt v. *Wickliffe*, 27 U. S. (2 Peters), 214.

Ruckman v. *Cory*, 129 U. S., 387.

Wehrman v. *Conklin*, 155 U. S., 314.

Holland v. *Challen*, 110 U. S., 15.

Sawyer v. *Parish of Concordia*, 12 F. R., 754.

Pullman's Palace Car Co. v. *Transportation Co.*, 171 U. S., 138.

Ill. Cent. R. Co. v. *Adams*, 180 U. S., 28.

ARGUMENT.

I.

THE CIRCUIT COURT HAD JURISDICTION.

THE BILL SHOWS THAT BY LEGISLATION OF THE STATE AND JUDICIAL DECISION, CONSTRUING AND APPLYING THE SAME, SUBSEQUENT TO THE VESTING OF COMPLAINANT'S CONTRACT RIGHTS, SUCH CONTRACT RIGHTS WILL BE DIVESTED OR IMPAIRED IN BREACH OF THE FEDERAL CONSTITUTION; AND THE BILL SEEKS TO PREVENT SUCH IMPAIRMENT.

In this case the Federal questions are involved, not merely incidentally, but directly and primarily. The complainant came into the Federal Court of Equity because the Supreme Court of Illinois has laid down the rule, with reference to this statute and this complainant, that:

> "Whether her right to a deed would have been a defense is not involved here, because she lost that right absolutely at the expiration of five years, and from that time forward *had no further interest in the premises.*" (186 Ill., p. 533.)

The contract conveyed the legal title to the property to the trustee for the benefit of Mrs. Bradley until the debt to her should be *paid*. She took possession for condition broken before the statute was passed and had the lawful right to *stay in* until the debt was paid. The legal title never went back out of the trustee to the maker of the trust deed. It never became merged in any decree or certificate of sale. It is a patent impossi-

bility for a *title* to land to be merged in a decree or merged in a certificate. It remained in the trustee, and from November, 1871, when Mrs. Bradley took possession of the property, Mrs. Bradley had the legal possession of the land (which possession is property in itself), and the absolute right to the legal title in the trustee, which is also property. The Supreme Court decides that this statute divested this property; that her non-compliance with this statute, passed after she took possession and after her rights had accrued, operates to divest her and constitutes a weapon in the hand of Lightcap with which to drive her from the property.

And he is now about to drive her out. The Federal questions are not incidental here. They are primary and constitute the essence of the case. It is the unconstitutional character of the statute which creates the cloud which the bill seeks to remove.

But for this unconstituional construction and application of the statute the ejectment suit could never have been maintained.

If the statute as construed in 186 Ill., 510, is unconstitutional, then the Federal questions necessarily are here and the court has jurisdiction.

In *Smyth* v. *Ames*, 169 U. S., 466, at 516, the court said:

> "* * * It would, therefore, be sufficient to say, that these are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction, not only upon the ground of diverse citizenship, but upon the further ground that, as the *statute* of Nebraska, under which the State Board of Transportation proceeds *is assailed* as being *repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as rising under that instrument.*"
>
> *Ibid*, p. 518.

To same effect is *Railroad Co.* v. *Mississippi,* 102 U. S., 140, 141, where former decisions are summarized.

Where, upon the face of the bill the complainant in good faith alleges facts showing a contract, and facts showing a deprivation of rights thereunder, and facts showing that such deprivation is by virtue of state legislation subsequent to the contract; and claims in good faith in the bill that such state legislation by decision impairs the obligation of the contract, in violation of Article 1, Section 10, Federal Constitution, and deprives her of her property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution; and alleges that the defendant holds a paper conveyance from the grantee of her own mortgagor and contracting party which would be utterly void, except for said unconstitutional legislation and decision, and that by virtue of said unconstitutional legislation and decision that paper title held by the defendant from her mortgagor and contracting party constitutes a paramount title, by which he is about to drive her out of her property, she has a right to come into a Federal court of equity to have her title cleared of such cloud.

In such a case it is not necessary that she and defendant should be citizens of different states in order to confer Federal jurisdiction.

In *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S., 1, at pp. 6 and 7, the court said:

> "The demurrer to the plaintiff's bill rested principally upon a want of jurisdiction of the court in certain particulars, hereinafter specified. *There was confessedly no diversity of citizenship,* and the case was treated by the court below as one *arising under the Constitution and laws of the United States.*
>
> "1 The jurisdiction depends specifically upon the allegation in the bill that defendants insist that

the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by the plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water. * * *

"These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893."

In *City Railway Co.* v. *Citizens' Railroad Co.* (the Indianapolis case), 166 U. S., 557, at 562, the court said:

"1. There can be no doubt that the Circuit Court had jurisdiction of the case, *notwithstanding the fact that both parties are corporations and citizens of the State of Indiana.* It should be borne in mind in this connection that *jurisdiction depended upon the allegations of the bill,* and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citzens' Ralroad Company had become vested with certain exclusive rights to operate a street railway in the City of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. * * *

"That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in the *Western Paving & Supply Co.* v. *Citizens' Street Railroad Co.*, 128 Indiana, 525, in which the liability of the company for certain street improvements was discussed and passed upon. * * *

"That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, *and its ordinance ratifying the same*, is equally clear."

In *Yazoo and Mississippi Valley Railway Co.* v. *Adams*, 180 U. S., 1 (which case went up from the Supreme Court of the State of Mississippi), it was held as follows:

"As it appeared from the record in this case and the opinion of the court, that the defendants relied upon certain charter rights, which they insisted had been impaired by subsequent legislative action; and the [Mississippi] Supreme Court held that no such rights existed, it was *held*, that it sufficiently appeared that there was a Federal question necessarily involved in the case, and not only must have been, but actually was, passed upon by the [Mississippi] Supreme Court."

On pages 15 and 16, the court says:

"As we have often held, that where an impairment of a contract by state legislation is charged, the existence or non-existence of the contract is a Federal question, it is impossible to escape the conclusion that the foundation of the whole case was, whether there was really a contract which had been impaired, and that this was necessary to the determination of the case. As already stated, this was a Federal question, and the fact that the Supreme Court did not, in terms, discuss the contract clause of the Constitution, does not oust our jurisdiction. In view of this record and the opinions of the [Mississippi] Supreme Court, the certificate of the Chief Justice, that the validity of the state statutes was

> actually drawn in question under the contract clause of the Constitution, was but a further assurance of a fact already appearing. The motion to dismiss must, therefore, be denied."

At the same time the court took the three cases of the three railroad companies, including the *Yazoo and Mississippi Valley R. R. Co.* v. *Adams*, which were appeals from the Circuit Court of the United States for the Southern District of Mississippi, growing out of the same transaction which are reported in the same volume as *Illinois Central R. R. Co.* v. *Adams*, 180 U. S., 28. There, as here, the parties were compelled to take three courses of litigation and three sets of proceedings for review in order to bring their rights properly before this court. There, the appellant was compelled to proceed both in the State court in resistance to an action at law by a revenue agent of the state, and by bill for injunction in the Federal Circuit Court to enjoin that revenue agent from proceeding, and by a bill in the State court filed after the bill in the Federal court had been dismissed and intended to accomplish in that forum the same object which the Federal court had denied it for alleged want of jurisdiction. And it was contended there, that by going to the State court after jurisdiction had been denied it in the Federal court, it had waived, abandoned and lost its rights in the Federal court, even if they had existed, and that the judgment of the State court had become ***res judicata*** upon it.

But that contention was overruled, and the jurisdiction of the court was sustained, not only upon the ground of diverse citizenship as to the Illinois Central Railroad, but also upon the ground that the acts of the state officer under the state legislation presented a question arising,

under the Constitution and laws of the United States, and that jurisdiction was maintainable on behalf of the Mississippi corporation as well as on behalf of the Illinois corporation. The court said (pp. 35-37):

"3. But we are also of opinion that the bill presents a case under the Constitution of the United States, and that *jurisdiction may be sustained upon that ground alone.* The bill set forth the provisions of the Constitution of 1869, and the interpretation put upon it in the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, rendered in 1878, wherein that court construed these provisions, and declared that they did not require the legislature to tax the property of corporations for pecuniary profits; that this ruling had been repeatedly affirmed and had become the settled rule of property in the state, adopted and acted upon by the legislative, judicial and executive departments. The bill further alleged a continued course of legislative exemption of railway properties from taxation; that the railroad commission had never before denied the validity of the exemption of the Canton Company, nor attempted to assess that company for taxation; that the Constitution of 1890, expressly provided that exemptions from taxation to which corporations were legally entitled at the adoption of this Constitution should remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the general laws, unless sooner repealed by the legislature, and that successive legislatures had, since the adoption of that constitution, refused to repeal exemptions contained in charters theretofore granted; that the plaintiff, upon the faith of this interpetation of the constitution of 1869, and of a provision in the charter of the Canton Company exempting it from taxation for twenty years, advanced over $2,500,000 to build and equip the road; that the same was built with the money so furnished; that a lease of such road was executed to plaintiff, and that it had since been and is now in possession of the property; that the charter, with its exemption, the right to lease and the lease itself,

were contracts rightfully made in view of the settled law as declared, and were valid under the Constitution of Mississippi, as previously expounded, and that the obligations of these contracts were binding *as against any subsequent change of judicial decision.* The bill further averred, that the defendants, 'claiming to act under laws of said state, passed subsequently to said charter and its acceptance, are endeavoring to and will, illegally, impair and destroy the obligations of said charter contract, as aforesaid, unless restrained by your Honors, * * * and that they are also attempting and claim that they have succeeded in fastening upon said railroad a first and paramount lien under acts of said state, passed in 1892 and 1894, and acts done by them in 1898, which displaces and is paramount to the lien to secure said mortgage bonds.' * * *

"The bill clearly avers a case arising under the Constitution of the United States, and is one of which the Circuit Court *would have jurisdiction irrespective of the citizenship of the parties.* As we had occasion to observe in *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U. S., 557, 564, 'whether the state had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one.' See, also, *New Orleans* v. *New Orleans Water Works Company*, 142 U. S., 79, 88."

To same effect is *Vicksburg Water Works Co.* v. *City of Vicksburg*, 185 U. S., 65.

After years of adverse contention it was definitely established in case of the charters just cited that *charters* were contracts, that public works might be the subject of such contracts, and that public service corporations were entitled to the protection of the Federal courts in their rights under such contracts, against impairment and deprivation without due process of law, by hostile munici-

pal and state legislation, or by judicial decision changing the law subsequent to the vesting of their rights.

Public contracts and public service bodies are far more subject to be affected by change of public policy, and by the exercise of the police power; and many hardships have been excused upon such grounds; but no such excuses can apply to the contract here.

With how much greater force do these principles apply to the contract of Bradley with McCune for the loan of $15,000 and a mortgage of 680 acres of land.

II.

THE CONSTRUCTION GIVEN THE STATUTE BY THE STATE SUPREME COURT IMPAIRS THE OBLIGATION OF THE CONTRACT.

> "What is it, then, which constitutes the obligation of a contract? * * * It is the *law which binds* the parties to perform their agreement." WASHINGTON, J., in
>
> *Ogden* v. *Saunders,* 12 Wheat., 213, at 257.

> "The act of 1852 and the provisions of the code were in force at that time, and *entered into and formed a part* of the contract of the parties. They prescribed one of the remedies to which the bondholders were entitled in the event of default by the city. It has been uniformly held by this court that such remedies are within the protection of the Constitution of the United States, and that any state law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract. If the remedy be taken away the contract is in effect annulled. Nothing is left of it of any value to the party whose rights are thus invaded."
>
> *Butz* v. *City of Muscatine,* 8 Wall., 575, at 583.

The Illinois law of mortgages, as it stood August 13, 1868, was part of Mrs. Bradley's contract. By that law, it is alleged in the bill and admitted in the demurrer, the rights of the parties were fixed as follows:

> "And oratrix further shows that the law of the land as established by the decisions of the courts of last resort to the State of Illinois on the 13th day of August, 1868, was that the holder of a mortgage after condition broken was the real owner as against all the world, and that thereafter the mortgagor had only an equity of redemption which was an equitable right, the creation of the courts of chancery, and that after a foreclosure or an effort to foreclose a mortgage by the mortgagee, followed by possession of the premises, the mortgagee's holding was considered adverse as to all the world and under the title derived by and through the mortgage the mortgagee held as under claim and color of title. That unless the mortgagor redeemed, in acordance with the provisions of the decree or the statute, that he lost his equity of redemption, and thereafter the mortgagee was the sole owner of both the legal title and the equity of redemption."

This was the law of Illinois—that the holder of the mortgage, after condition broken, was the real owner as against all the world, and that thereafter the *mortgagor* had only an equity of redemption, and unless the mortgagor redeemed within the time allowed therefor *he lost his equity of redemption* and the mortgagee was the *sole owner.*

Bronson v. *Kinzie,* 42 U. S. (1 How.), 311, went up from the United States Circuit Court for Illinois.

The judges below were Mr. Justice McLean and District Judge Nathaniel Pope. They differed in opinion, and certified the questions up to this court.

There the order of dates, which is quite similar to that in the case at bar, was as follows:

The mortgage was dated and acquired July 13, 1838.

The default occurred January 13, 1841.

The law was changed February 19, 1841.

The law was further changed February 27, 1841.

The bill to foreclose was filed March 27, 1841.

The two new laws first gave the debtor the additional twelve months to redeem, and, secondly, required an appraisal at the sale and a sale for two-thirds of the appraised value; and professed to apply retroactively.

This court decided that the Illinois statute annexing twelve months to redeem and requiring sale at two-thirds of appraised value impaired the obligation of contracts made previous to the passage thereof. Mr. Justice McLEAN dissented. He maintained that this statute regulated only the remedy. The contention that such a statute affects only the remedy and is therefore within the power of the legislature is set forth in his dissenting opinion, pp. 326 to 330; but the court settled the rule that that view was erroneous.

The court said:

> "According to the long-settled rules of law and equity in all the states whose jurisprudence has been modeled upon the principles of the common law, the *legal title to the premises in question* vested in the complainant, upon the failure of the mortgagor to comply *with the conditions contained* in the proviso; and at law, he had a right to sue for and recover the land itself. But in equity, this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conrad* v. *The Atlantic Insurance Company*, 1 Pet., 44. It is upon this construction of the contract that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective

rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee; and never deprive him of his right at law *until his debt is paid;* AND (*not* OR) he is entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery, and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

"When the contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of this court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; *and, therefore, entered into the contract, and formed a part of it, without any express stipulation* to that effect in the deed. * * * They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

" 'It [the new act] declares that although the mortgaged premises should be sold under the decree, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it, moreover, gives a new and like estate to the judgment creditors to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it

> would be difficult to say at what point they must stop. * * * *Any* such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution."

This was just as much the law of mortgage and the law of the contract which Mrs. Bradley took August 13, 1868, as it was in 1838, when Arthur Bronson took the mortgage which was before the court in that case. The names and figures being changed, the law laid down there is the law to be laid down here. And in support hereof we beg to call attention without repetition to Point IV in our brief and argument, in which the Illinois law of mortgages involved here is summarized, and the change to her injury shown.

McCracken v. *Hayward*, 43 U. S. (2 How.), 608, applies the same rule to so much of the same statute of Illinois as applied to judgments. The court enumerate the remedies which the plaintiff had at the time of making his contract, and add:

> "These laws giving these rights were as perfectly binding on the defendant and as much a part of the contract as if they had been set forth in its stipulations in the very words of the law."

Gantly's Lessee v. *Ewing*, 44 U. S. (3 How.), 707, 717, applies the same rule to an Indiana appraisement law. The court says:

> "The new remedy prescribed by the act of 1841 *changed the contract.*"

In *Von Hoffman* v. *Quincy*, 71 U. S. (4 Wall.), 535, the court held that a statute restricting the power of taxation available to pay municipal bonds was unconstitutional; that the statute which authorized taxation to pay the bonds at the time they were issued is a part of the bond, and said:

> "The prohibition has no reference to the *degree* of impairment. The largest and the least are alike forbidden."

To the same effect is *Green* v. *Biddle,* 21 U. S. (8 Wheaton), 84, where WASHINGTON, J., said:

> "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, *imposing conditions not expressed in the contract,* or dispensing with the performance of those which are, *however minute or apparently immaterial in their effect* upon the contract of the parties, impairs its obligation."

The correct rule on the subject of remedy as a part of obligation is stated in *Walker* v. *Whitehead,* 83 U. S. (16 Wall.), 314, at 317, thus:

> "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and *enforcement.* Nothing is more material to the obligation of a contract than the means of its enforcement. *The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment.* The obligation of a contract 'is the law which binds the parties to perform their agreement.'
>
> "Any impairment of the obligation of a contract —the degree of impairment is immaterial—is within the prohibition of the constitution.
>
> "The states may *change* the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the

substantial means of enforcement, which existed when it was made. The guaranty of the constitution gives it protection to that effect."

To the same effect are:

Gunn v. *Barry*, 82 U. S. (15 Wall.), 610.
Seibert v. *Lewis*, 122 U. S., 284.
Barnitz v. *Beverly*, 163 U. S., 118.
Shapleigh v. *San Angelo*, 167 U. S., 646.

THE APPLICATION OF THE RULE TO THE FACTS HERE.

The purchaser, at the end of the period of redemption, had an absolute right to get the legal title; that is, a perfect, equitable title; that is her right, and that is a portion of the mortgagee's contract with the mortgagor that the purchaser shall have that right; that is, the party would have the right to enforce the contract. When that purchaser went into possession, nobody could disturb that purchaser, because she had everything, the equitable title, the absolute right to get the legal title, and the possession.

And here the purchaser, Mrs. Bradley, had not only all this, but the successors in trust conveyed her the legal title also, in June, 1894, before the ejectment plaintiff, Lightcap, had received Prettyman's quit claim or had any trace of title whatever.

It may be conceded that the legislature had the right to limit the time within which to take out the deed as to future contracts, but even as to this case, which was a prior contract, and as to which her agent had already entered, while it cannot be conceded that the statute applies, still, supposing it did apply, what is the effect if she does not take out her deed within the statutory time? Merely, that she cannot get her deed; but, *being in pos-*

session, and having perfect, equitable title, she does not need any deed.

The dry legal title would remain in the trustee to whom it was conveyed (except that in this case the successor in trust in turn duly conveyed it to Mrs. Bradley, so that she has the legal title also); but the purchaser, the third party purchasing, has this, the perfect, equitable title, which is nothing else except the *right to get* the legal title. When the mortgagor's time of redemption expired the purchaser had a right that was absolute. Being in possession, the purchaser did not need any deed, because, having the equitable right to the property and the possession, nobody would disturb her, whether she had the legal title or not. And, having a perfect and equitable title, that has remained perfect and unimpaired, the mere enactment that no master's *deed* should issue to her might not deprive here of any *right.* It might be said to be a deprivation of a valuable remedy; but when the decision construing the act goes further, and permits the failure to get a master's deed within five years, to be used as a sword to drive that person in possession out, it then, if upheld, operates to *change the right,* and not be a mere deprivation of one of her remedies.

A limitation law *against plaintiffs* never *enabled* a plaintiff to maintain an ejectment suit, and when the Illinois Supreme Court gives to the act of 1872 such an effect by any process of reasoning, then the act deprives the purchaser of something that is more than a remedy. The title is changed and *put back into the mortgagor* by the limitation law, and that makes of it not merely a limitation law, but *a law depriving all the right,* destroying all the title, and impairing the obligation of the contract under which that title and the right to that title were given.

That right of a purchaser, whether as a mortgagee or a third person, *is a valuable part of the contract to the mortgagee; it increases the market value of the security.*

The contract entered into August 13, 1868, as construed by the law of the state at that time, conferred upon the *cestui que trust* the equitable title to the lands. Upon breach of condition the title became absolute. She could recover in ejectment if the mortgagor refused possession. If she foreclosed her mortgage in chancery *she could take out a deed at any time,* and her equitable title could not be affected *if she never did so.*

Carroll v. *Ballance,* 26 Ill., 9.

And, as was held a year after the original mortgage was made, and *a month after* the substituted mortgage was taken, she could have taken out her deed *at any time within twenty years.*

Rucker v. *Dooley,* 49 Ill., 377; decided Sept., '68. (The substituted mortgage was taken August 13, 1868.)

And this rule of law, as constituting the obligation of the contract, was set up and pleaded in the amended bill herein, citing the last authority by name, (see Transcript, p. 58), and claiming that it was itself a change of the law.

Complainant's defense to the ejectment suit having been taken away by a state statute, which contravenes the Constitution of the United States, a bill for relief against that statute is a suit in equity arising under the Constitution of the United States.

Again, in 1872, when this act was passed, Mrs. Bradley had a mortgage by which she had a right to have that sale under which the purchaser was subject to no such condi-

tions of losing his title. This right was protected as much as any other right of a mortgagee is protected; for example, just as a mortgagee is protected against the imposing upon his purchase an appraisal or an extended redemption, that did not exist before.

In *Barnitz* v. *Beverly*, 163 U. S., 118, the court held that a state statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which *extends* the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a *mortgage executed* before its passage. The court said, by Mr. Justice SHIRAS (quoting from the *Brine case*, 96 U. S., 637):

> "This court held, through Mr. Justice MILLER, that all the laws of a state existing at the time a mortgage or other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts; * * * that it is therefore said that these laws enter into and become a part of the contract;" (and quoting from other cases) the remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation.
>
> "What we are now considering is whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right, and as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act (which provided that the land 'shall not again be liable for sale for any balance') does deprive the plaintiff of a right inherent in her contract.
>
> "When we are asked to put this case within the rule of those issues in which we have held that it is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the con-

tract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to the probable effect on the rights of the parties.

"It is contended that the right to redeem granted by the statute only operates on the *purchaser*, and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson* v. *Kinzie*, when this court said," etc. (And then the court quote the last paragraph from that opinion, which we have requoted in the extracts from that case above, and apply it as we ask to have it applied here.)

The statute means (for the purpose of testing it by the federal constitution) what the State Supreme Court decides it means. And impairment by judicial construction of a statute is just as much prohibited as by legislative words.

Butz v. *Muscatine*, 75 U. S. (8 Wall), 575.
Chicago v. *Sheldon*, 76 U. S. (9 Wall), 50.
Louisiana v. *Pilsbury*, 105 U. S., 278, at 295.

See cases cited in Points I and II above of our brief.

Again, the literal and retroactive construction of said statute of 1872 is unconstitutional and void, if applied to the case here, because it purports to annul, as to a mortgage made before the law was enacted *and as to suit pending before the law was enacted*, a certificate of purchase upon which the holder does not take a deed within a certain limited time.

The legislature has no power, by statute (nor the courts by construction thereof), to annul a contract or any right growing out of a contract. In this case the contract out of which the certificate of purchase arose was the McCune trust deed, made before the enactment of the statute. The legislature had no power to annul it or the certificate of purchase growing out of it.

As was decided in *Smyth* v. *Ames,* 169 U. S., 466:

> "The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

Now, it was a means of enforcement which the law of Illinois secured to plaintiff at the time she took this contract, that she could enter for condition broken and *stay* in until the debt was paid; *and in addition to that,* she could file a bill and obtain a decree that the party desiring to terminate her possession must pay within a brief time to be fixed, or stand forever barred. The law did not give her *an election* between those remedies. It gave her both of them. And a state which through its statutes and its courts says she shall be reduced to an election between them (and then force one of them upon her on her bill to rescind), and shall be put out of possession because she does not exercise that election in the way and in the form and by the means which such subsequent statute requires, violates the Constitution.

Still it may be urged, the *language* of said statute does not *necessarily* imply the annulling of any right appertaining to property. It can be construed as a statute of limitations, depriving the holder of the certificate of any further remedy under the certificate after the time limited.

It might have been so construed, and so have given it effect within constitutional limits. Such a thing was done in *Newland* v. *Marsh*, 19 Ill., 376, when the limitation statute expressly declared that the holder of color of title to land, after complying with certain provisions of the statute "should be deemed the legal owner."

This language, literally unconstitutional, was held to mean that the owner of the legal title should, after the performance of said provisions of the statute, be barred from bringing action against the possessor under color of title.

If the Statute of 1872 were so construed as to avoid the constitutional objection, it must be understood as affecting the remedy only, not as annulling the certificate of purchase.

What was the remedy provided in the certificate of purchase? That in case the mortgagor failed to redeem, the holder might demand and receive a deed from the master in chancery.

If this remedy is barred, then the holder of the certificate of purchase cannot demand and receive a deed from the master in chancery.

In all other respects, the RIGHTS *of the holder would remain as they were before.* She had acquired the equitable title under the trust deed out of which this certificate arose, and *that title would remain.* She had caused entry to be made upon the premises peaceably under said trust deed prior to the enactment of said statute; and rightfully, as owner of the equitable title, under the law of the land at the time, *that right of possession would remain.*

Again, these remedies were:—to reduce the mortgaged premises to possession, peaceably, if possible, by eject-

ment, if necessary, to retain possession until satisfaction of the debt, to sue, in assumpsit, the mortgage debtor, and to prosecute a bill in equity to foreclose the mortgage.

It is admitted by the opinion that appellant was pursuing two of these remedies concurrently, foreclosing in equity and reducing the premises to possession. But the court continue, "when a decree of foreclosure was entered and the land was sold, the security *had been appropriated* towards the satisfaction of the debt and all her right in the land *merged* in the *decree* and *sale.*"

This is entirely wrong. "*All* her right in the land" *did not* "merge in the decree and sale." They ("the decree and sale") were steps in *one* of her remedies. She had rightful possession *by the other;* and that rightful possession never merged in anything.

The legal title still stood in Johnson, trustee, in trust for her, and in aid and support of her rights. And by the sale, under the decree, upon the expiration of the right of redemption, her equitable title became complete, and such legal title was held in trust for her and her alone.

How could either the legal title or her equitable title be merged in a *decree* or a *sale?* Titles vest and merge only in persons. The trust deed was itself an evidence of the title which still remained in the trustee for her, and which continued so to stand.

The decree so finds and confirms the title. Therefore, but for change of law, appellant (or Johnson as trustee for her) could still have recovered *as plaintiff* in ejectment. Much more could she successfully *defend* in ejectment against the quit-claim grantee of her own grantor.

Esker v. *Heffernan,* 159 Ill., 38.

This claim of merger of title in a decree was made in *Williams* v. *Brunton,* 3 Gilm., 600 (618-22), and the law stated as above.

But the court continue: "After the sale the trustees had no title." Yet, in the next paragraph (p. 66), they say: "The certificate of purchased conveyed no title to the complainant." How, then, was the trustee's title divested and to whom did it go? Could a proceeding to foreclose Prettyman's equity of redemption reinvest *him* with the legal title?

The idea that the "title the trustee had was only for the purpose of enforcing the provisions of the trust deed, and that having been done by the court, his powers, rights and duties were at an end," is absurd, when it is still claimed the court did *not* enforce the provisions of the trust deed by giving plaintiff in error title to the security.

The court further say, in the said opinion: "The sale created a new relation in no manner affected by the fact the complainant had been the party secured by the trust deed."

What is this new relation? Does buying at her own sale reduce the *cestui que trust* in possession to the position of a mere certificate holder out of possession? Instead of buying in the land, did she surrender her title for the certificate of purchase?

No, the new relation referred to must be in addition to the former one, the rights of the holder of the *equity of redemption* being *reduced* to a definite period of redemption, after which his title would cease.

The statute changes the law of foreclosure; and, as construed and applied here by the State Supreme Court, changes not only the law of foreclosure, but also the substantive law of mortgages and impairs the contract and

vested rights of appellant. If that decision is founded upon the Illinois statute, it rests upon an unconstitutional statute, changing the law and impairing our contract rights. If it is founded upon the conclusion of that court as to the substantive law regulating mortgages and the rights and estates of parties thereunder, then it rests upon a change of law by judicial decision, after our rights had become vested, which is equally prohibited by the Constitution.

III.

THE CONSTRUCTION GIVEN THE STATUTE OF ILLINOIS BY THE ILLINOIS SUPREME COURT IN 186 ILL., 510, DEPRIVES THE PLAINTIFF OF HER PROPERTY WITHOUT DUE PROCESS OF LAW.

It Violates the Fourteenth Amendment to the Federal Constitution.

In November, 1871, plaintiff had the actual possession of the land, and the legal title thereto stood in her trustee for her benefit. It did not stand in the mortgagor, and it never has got back into the mortgagor. The statute, as construed, deprives her of this property. It has operated to take the title away from her trustee for her benefit and put it back into the passive grantor, who has done nothing to reacquire it. It is not merely a limitation law barring a suit brought now by Mrs. Bradley. It has enabled her grantor's grantee to sue her and expel her from the property, and yet nothing has happened to bring this about, except that the legislature of Illinois have passed a statute, and the highest court of that state have applied it retroactively to appellant in possession. This statute deprives her of her property without due

process of law. The ejectment action is not due process of law *taking* title from her. It *finds* that the title was *already* taken away by the statute of Illinois. In that ejectment action the court, in effect, say:

> "You lost your title back in 1886 (when the five years it allowed for taking out a deed expired) because *the statute took it away from you and reconveyed it to your grantor.*"

It is expressly the case, then, of the transfer of the property from the plaintiff to the defendant by act of the legislature. *This title-transferring decision violates the Fourteenth Amendmeht, as well as the first article, Section* 10.

Possibly the legislature might enact that a party must take out a deed by a certain time or lose the right to take it out; but this statute goes much further. It lifts the title up out of the trustee, and the equitable title out of the mortgagee in possession for condition broken at the time the statute is passed, and generously hands it back again to the grantee of the defaulting debtor. And it enables him to deprive her of possession. It deprives plaintiff of property without due process of law.

The decision of the Supreme Court of Illinois in this case is itself obnoxious to the Federal Constitution, because it makes such a change in the law of the land as to deprive appellant of her equitable title to the land in question, without due process of law.

By the law of the land at the date of the breach of condition in the McCune mortgage, the legal title became vested in the trustee Johnson for use of appellant. She therefore had a vested equitable title to the land. She was entitled to possession, which she secured without objection. She might have proceeded to acquire the legal title by advertisement and sale, or by foreclosure in equity.

She filed a bill to rescind the release and reinstitute the original mortgage. The court instead gave her a foreclosure decree and sale, at which she became purchaser and secured a certificate of purchase.

After the expiration of the period of redemption, therefore, appellant was entitled, whenever she demanded it, to receive the legal title. She had, therefore, a perfect equitable title.

By what means is it claimed this equitable title has been divested?

If by the statute of 1872, then the statute is unconstitutional, as we have already seen.

If by a change of the views of the court of last resort, since the date of said transactions, then the decision of the court infringes our constitutional rights.

A few quotations from the many decisions of this court upon this point will confirm this statement.

C., B. & Q. Ry. Co. v. *Chicago,* 166 U. S., 226.

Here the property of the railroad company was taken for a street, in condemnation proceedings which were regular, according to the statute, but the verdict of the jury and the judgment of the court awarded only nominal damages—$1.00. This proceeding was alleged to be in contravention of the Fourteenth Amendment, taking property without due compensation. The court said, in part:

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

And much more is there said, both in the opinion of the majority and in the dissenting opinion, confirming the correctness of the contention we are making in this case, viz., that if the equitable title once vested in plaintiff in error by the acts of the parties under the law as then understood and promulgated, it cannot be afterward divested by a change of judicial holding.

In the case of *Bank of Kentucky* v. *Stone,* 88 Federal Rep., 383, affirmed in this court without opinion, May 15, 1899 (174 U. S., 799), the charter of the bank exempted it from taxation for a certain time, and the Supreme Court of the state construed the charter as a contract which could not be repealed. Afterwards, however, the same court changed its views and upheld a tax levied against the bank. In the Circuit Court the published opinion seems to indicate that this was the material point in the case, and their opinion, holding that such a change of judicial construction was a violation of constitutional restrictions, was apparently affirmed by this court.

In *Scott* v. *McNeal,* 154 U. S., 34, the federal question was whether the Fourteenth Amendment of the Constitution was violated by a decision of the state court in an action of ejectment sustaining the title of defendant in error, who derived title through an administrator's sale, where it subsequently developed that the person whose estate was administered was not dead.

The court said (p. 45):

> "The Fourteenth Article of Amendment to the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person with its jurisdiction the equal protection of

the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities."

Citing *Virginia* v. *Rives,* 100 U. S., 313, 318, 319.
Neal v. *Delaware,* 103 U. S., 370, 397.

Appellant cannot be deprived of her title to this land, which had become vested in her, by the arbitrary act of either legislature or courts of the state. If the laws of the land vested the title in her at the time, the Supreme Court of Illinois cannot now, by arbitrarily denying that the laws did have that effect, divest her title. Such arbitrary exercise of power has been checked whenever it has been attempted.

Yick Wo v. *Hopkins,* 118 U. S., 356.
Henderson v. *New York,* 92 U. S., 259.
Chy Lung v. *Freeman,* 92 U. S., 275.

In discussing this point the Supreme Court of Illinois, in the opinion attached to record No. 306, say (p. 65):

> "The second proposition is that the complainant has equitable title to the premises through the trust deed, the sale and expiration of the period of redemption, which gave her a right to a master's deed. It is argued that after fifteen months the right of redemption of Prettyman and his creditors was gone, and that right being barred, he had no title, but that complainant is the equitable owner, although the certificate became null and void. If the title of Prettyman passed out of him at the expiration of the period of redemption it must have gone somewhere. It was not *in nubibus*, and it did not go to complainant or any other person. The certificate of purchase conveyed no title to complainant."

It is not pretended the certificate of purchase carried any title. We have never advanced that claim. The trust deed had already conveyed the legal title to Johnson upon

a condition of defeasance in 1868. The condition had been broken in 1871, and then the title of Prettyman passed to Johnson for use of plaintiff in error. It was not necessary that it should pass again at the expiration of the period of redemption. It was only his equity of redemption which expired then. It did not pass to anybody. The title which had passed to the trustee and *cestui que trust* more than ten years before was not affected in any way.

It is quite a different case when sale is made under a judgment. There the previous mortgage conveyance is wanting, and the title is conveyed only by the sheriff's deed.

The case cited by the said Supreme Court of Illinois in support of their views above quoted is a judgment sale, and yet, even there the Michigan court regard the purchaser and certificate holder as having the whole equitable title, while the judgment debtor has only a naked legal title after expiration of redemption.

The observations and citations of the Supreme Court of Illinois next following (p. 66), to the effect that the purchaser and certificate holder is not entitled to possession, rents and profits, are no doubt correct. But in the case under consideration possession had been secured at a time when plaintiff in error *was* entitled to it. Even in their said opinion it is not denied that the mortgagee, after condition broken, may both foreclose in equity and sue in ejectment (p. 64). If he forecloses in equity *only*, the statute gives the right of redemption, and he cannot get possession until that expires. But he can concurrently recover possession in ejectment, and so get into possession before or after decree of foreclosure. (*Esker* v. *Heffernan*, *supra*.)

Moreover, it appears from the very case cited by the Supreme Court of Illinois in the support of their claim that the certificate holder is not entitled to possession, the case of *Whiting* v. *Butler,* 29 Mich., 122, that "one who is entitled to a deed of premises has an equitable right in them." If so in a case where the purchaser had no previous conveyance, but only a certificate of purchase under a judgment lien, certainly this authority also supports our position, that plaintiff in error was, after condition broken, absolute owner of the equitable title as against the mortgagor and all persons holding under him; and after the expiration of the mortgagor's redemption, when plaintiff in error, because entitled to a deed upon demand, January 27, 1881, she was certainly the owner of the equitable title, and in possession. How, then, can any statute of limitations or judicial decision of any court divest that title without due process of law? And the ejectment cases are not such due process of law (*Williams* v. *Brunton, supra.*)

The dissenting opinion of Justice HAND, of the State Supreme Court, in the equity case (No. 306 on the present docket of this court), expresses the law upon this point. He says (Trans., 306; p. 74):

> "So soon, however, as the right of redemption had expired the appellant became equitable owner of the land, with the right to take a deed, which would have vested her with the full title to the land, both equitable and legal, and the grantor of appellee had left remaining in him only the naked legal title to the land, which could have been divested by the appellant at any moment and without any act being performed by the grantor of appellee. All that was then necessary to complete her full title and ownership was the execution to her of a deed by the master. The master had no legal or beneficial interest in the land. He was simply a conduit through which,

by virtue of a deed, the legal title would pass from the grantor of appellee to the appellant. As the grantor of appellee at that time had only the legal title, all the equitable interest in the land was in appellant, and upon uniting the legal title and equitable interest in her by a master's deed her title would have been consummated and become complete.

"In *Stephens* v. *Illinois Mutual Co.*, 43 Ill., 327, the court had under consideration the question whether or not the mortgagor had an insurable interest in the mortgaged property after foreclosure and sale during the time allowed for redemption, and it was said (p. 331):

"'At the time of the fire, then, the position of Stephens was substantially that of a mortgagor, with a right to redeem.'

"That in this position he would have had a substantial, insurable interest does not admit of doubt. His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this state the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien in order to cut off intervening encumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification, that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the time allotted.

"The case of *Whiting* v. *Butler*, 29 Mich., 122, is very instructive upon the questions of the respective rights of the judgment debtor and purchaser in premises sold upon execution after the term of redemption has expired. Opinions were filed by four

different members of the court. Mr. Justice COOLEY, on page 129, says:

"'After Drury had become entitled to a sheriff's deed Campau's title would have been a mere legal title, with the whole equitable right in Drury.' And Mr. Justice CAMPBELL, on page 143, said: 'The Drury title became an indefeasible right as soon as the statutory period of fifteen months expired. The interest which Drury obtained by his execution sale was a vested and valuable estate.'

"Though not the legal estate, it was an equitable estate.

"Jones, in his work on Mortgages (Vol. 2, Sec. 1661), in speaking of the rights of parties after sale, says: 'The mortgagor still has the estate of a mortgagor, with his qualifications; that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.'

"In *Ketchum* v. *Schicketanz*, 73 Ind., 137, it was held that with the expiration of the time allotted for redemption the holder of a sheriff's certificate for land sold on execution or decretal order acquires an equitable estate in the land, of which one-third will pass to the wife upon the bankruptcy of the husband under the statute of the state, which provides that the surviving wife shall have one-third interest in all the lands in which the husband had an equitable interest at the time of his death, and that her inchoate interest in his lands shall vest absolutely where the same are conveyed away from him, under judicial proceedings.

"In *Wright* v. *Douglass*, 2 N. Y., 373, it was held the interest of a purchaser at an execution sale after the time of redemption had expired becomes an estate subject to sale upon attachment.

"It seems clear that the equitable estate in said lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought eject-

ment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession, during the period of redemption, was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked title. As was said in *Whiting* v. *Butler, supra* (p. 139):

"'His right vested to a deed had become complete and vested. All he lacked of a legal title to the land, superior and paramount, was the legal evidence such a deed would afford, and his right to this evidence or muniment was not contingent, not dependent upon the will or discretion of any one. It was so complete that it was not necessary for him to resort to equity to obtain it if withheld. The right to it was so plainly and exclusively fixed and legal as to be cognizable at law and enforceable by mandamus,' and in this state the appellant could have obtained the relief on motion. (*People* v. *Bowman*, 181 Ill., 421.)

"Under the repeated decisions of this court it is clear that by virtue of the terms of the statute above referred to, upon the failure of the appellant to take out a deed within the time fixed therein, the certificate of purchase issued to her became null and void, and that no right could be predicted thereon by her (*Ryhiner* v. *Frank*, 105 Ill., 326; *Peterson* v. *Emmerson*, 135 Id., 55; *Belville Savings Bank* v. *Reis*, 136 *Id.*, 242; *Seeberger* v. *Weinberg*, 151 *Id.*, 369; *Brown* v. *Ridenhower*, 161 *Id.*, 239.) The appellant, however, is not claiming any right here by virtue of the certificate of purchase, but being the equitable owner of the premises by virtue of the decree of foreclosure, the sale and the decree confirming the sale, and being in possession of the premises, the

question is, should a court of equity permit her to be turned out of possession by one who has only the mere naked legal title to the land?

"The statute requiring a deed to be taken out within five years from the expiration of the period of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (*Ryhiner* v. *Frank, supra.*) The same rule of construction must therefore be applied to this statute that the courts have heretofore applied to this statute of limitation in general, and the law is well settled in this state that the statute of limitations does not run against a party while in possession of land. (*Mills* v. *Lockwood,* 42 Ill., 111.)

"In *Barker* v. *Shannon, supra,* the court said (p. 392): 'A statute of limitations or rules of limitation in equity does not run against a possessor of real estate, but it runs against him who is out of possession.' (*Mills* v. *Lockwood,* 42 Ill., 111.) 'The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.' To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law, and make it more obnoxious to both the state and federal authorities.

"It would seem, therefore, that while the right to a master's deed had been swept away by the statute, the statute had no effect upon the equitable interest of the appellant, accompanied as it was by her possession; that the statute did not operate upon the interest here asserted by reason of her possession, and that it is beside the case to say that the statute has barred her right to a deed.

"The equitable estate of appellant in the land after the period of redemption had expired, arose, not out of the certificate of purchase, which amounted to no more than evidence of her bid, and when the period of redemption would expire, but by reason of her bid the application thereof upon the decree, and

the fact that the appellee failed to redeem and her possession."

Judge GROSSCUP'S views on the equity of the bill (see his opinion in the Appendix), accord entirely with the views expressed by Mr. Justice HAND, of the Illinois Supreme Court, as to the law upon this point and its effect upon the title of the parties, so far as this case is concerned.

If appellant has an equitable title, a court of equity will enjoin proceedings, at law and direct the cause to proceed in equity.

Mills v. *Lockwood*, 42 Ill., 111, is an illustration of this principle, as the case is in many respects like the case at bar.

Cephas Mills had deeded the lands in question to one Biers, through whom Lockwood claimed, but an error had been made in the description. Possession had been given of the land and Lockwood held possession. Ejectment was brought by parties claiming under Cephas Mills subsequently to his deed to Biers. Lockwood endeavored to make title by tax deed, by limitation and by administration sale upon claim filed against the estate of Cephas Mills. All of these defenses proved defective and judgment was finally secured against him. Taking a new trial under the statutes of Illinois, by which the final judgment was vacated, he filed his bill in equity for injunction against said ejectment proceedings and for reformation of deed. The bill was sustained and the relief granted. Upon the question of laches in applying to a court of equity the court said:

"On the point of laches, in not resorting to this remedy at an earlier period, the answer is, the statute of limitations has not run against the com-

plainant, and he has been, all the time since his purchase, in the peaceable possession of the lands. He was in no position to act; he could only be quiet, awaiting the attack of those who supposed that had paramount title. In such case, the lapse of time is not material. So soon as the heirs at law of Cephas Mills brought their action of ejectment and recovered a verdict, then complainant filed this bill, alleging the mistake and seeking to correct it. He had no motive to move before he was molested. If there be any laches, is it not rather imputable to the heirs, who slumbered on their rights, if they had any, so many years? It is not understood that a statute of limitations, or rule of limitation in equity, runs against a possessor of real estate, but it runs against him who is out of possession. *Barbour* v. *Whitlock*, 4 Monroe, 197."

In *Wilson* v. *Byers*, 77 Ill., 76, the land had been entered by David Rawlings, but there was a mistake in the certificate of purchase, by which the range read South instead of North. After having been in possession of the patentee and his assigns for many years the land was platted as an addition to the City of Olney. Then Wilson procured a patent from the government by a correct discription and made claim to the property. Byers *et al.*, filed a bill in equity for relief and removal of cloud, and for a conveyance to them by Wilson. The relief was granted, the court saying in part:

"It is insisted, too, that there has been such laches as should bar the claim for relief.

"Laches cannot be imputed to one in the peaceable possession of land for delay in reporting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. *Mills* v. *Lockwood*, 42 Ill., 112. The possession is notice to all of the possessor's equitable rights, and he need assert them only when he may find occasion to do so.

"The tract was purchased by Wilson, with "Porterfield" scrip, which was worth $5 per acre, because applicable to unoffered lands; and it is insisted that it was erroneous to compel Wilson to convey to complainants the rights held by him under this scrip; that it was an appropriation of this scrip to complainant's use without consideration. But Wilson purchased the land with notice, and in consequent fraud of the rights of the complainants or their grantor, and held the title which he acquired but as their trustee.

"Whatever the sum he might have paid for the land, it would in no wise effect complainant's right to a conveyance of the legal title."

Still more like the case at bar was *Ruckman* v. *Cory*, 129 U. S., 387, the facts of which are stated under Point I of this argument.

Many decisions to the same effect in the several State Supreme Courts and in this court are cited in our brief. Only in this court of equity can appellant be afforded complete relief. The appellee holds as a volunteer with full notice of appellant's rights, and as the bill alleges, without actual consideration. He should be compelled to convey to appellant in order to perfect her title.

The legislation to carry into effect the Fourteenth Amendment sustains this remedy.

While not indispensable to this argument, we conceive that the effect of Sec. 1979 of the Federal statutes powerfully reinforces it.

The Fourteenth Amendment provides:

"Sec. 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state de-

> prive any person of * * * property without due process of law."
>
> "Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (14th Amendment. Ratification proclaimed July 25, 1868.) (The McCune mortgage is dated August 13, 1868.)

On April 20, 1871, Congress passed a statute to enforce the amendment, viz., 17th U. S. Statutes at Large, p. 13, entitled "An Act to enforce the provisions of the 14th Amendment to the Constitution of the United States, and for other purposes."

By the Revision of 1874, approved June 22, 1874, this section was incorporated into the Revised Statutes as Section 1979, which reads as follows:

> "Sec. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (See Secs. 563, 629.)"

The history of the broad enlargement of Federal power and consequent enlargement of the jurisdiction of Federal courts by the Fourteenth Amendment is lucidly stated by the most interesting chapter on "The History of the Fourteenth Amendment," in Mr. W. D. Guthrie's book devoted to that amendment of the Constitution.

It is not necessary now to review the earlier decision of the Court (in the *Slaughter House Cases*, 16 Wall., 36), in which the Fourteenth Amendment was held by a majority (CHASE, C. J., and FIELD, J., BRADLEY and SWAYNE, JJ., dissenting), restricted to political grievances and grievances affecting the colored race.

That view has long since been outgrown. The true view has perhaps never been better expressed than by Mr. Justice FIELD, at the Circuit Court, in the case of *Santa Clara Co.* v. *S. P. R. Co.*, 18 F. R., 385, at pages 397-99, delivered in 1883. This view was affirmed by the Supreme Court in that same case, 118 U. S., 394, and in numerous cases since, notably *Smyth* v. *Ames*, 169 U. S., 466, heretofore quoted.

Section 1979, enacted "to enforce the provisions of the Fourteenth Amendment," as the title of the original act from which it was taken says, *has an equally wide scope.*

Section 1979 long stood unconstrued in its application to Federal jurisdiction. It was natural that in the first cases presenting its application to Federal jurisdiction the same restricted view should be taken of it as was of the Fourteenth Amendment itself. And it is equally natural and necessary that the larger view of the Fourteenth Amendment shall be extended to the statute passed to give it effect.

That this view has not been always entertained we recognize, but just so it was not entertained of the Fourteenth Amendment itself. As the recognition has come of the broader scope of the Fourteenth Amendment—so the recognition will certainly come of the broader scope of this *legislation to give effect* to the Fourteenth Amendment.

A case in which this Fourteenth Amendment and this Section 1979 are specifically invoked by the bill as they are here (See allegations citing same, Tr., p. 55), is a case arising under the Constitution and laws of the United States.

The state of the law prior to the adoption of Section 1979 is shown by the decision of BRADLEY, J., in

Live Stock, etc., Assn. v. *Crescent City Co.*, 1 Abb. (U. S.), 388; 15 Fed. Cases., p. 649, *decided June* 10, 1870.

The issue and the decision in that case are summarized in the syllabus as follows:

> "An exclusive privilege granted to a few individuals, incorporated into a body politic,, and to their successors for twenty-five years, to have cattle landings, stock yards, and slaughter houses for several miles in extent in and around the City of New Orleans, with a prohibition to all other persons from having any such establishments in said district, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety; and a legislative act granting such an exclusive privilege is a violation of the Fourteenth Amendment and void."
>
> "If, however, the State Courts sustain such a law and attempt to enforce it, the Circuit Court cannot issue an injunction to stay proceedings, being prohibited by the Act of 1793 (1 Stat., 333), *and Congress having passed no law to carry the Fourteenth Amendment into full effect.*"

In developing this view Mr. Justice BRADLEY said:

> "Congress has *not yet* assumed that jurisdiction."

The following year Congress took pains to remove the difficulty which stood in the way of Mr. Justice BRADLEY in that case. The Act of April 20, 1871, was passed, which is now Section 1979. The law therefore under Section 1979 is exactly the reverse of what it was when Mr. Justice Bradley gave his decision.

Section 720 of the Revised Statutes forbidding injunctions by Federal Courts against suits in State Courts

was originally enacted March 2, 1793 (1 Stat., at Large, 334), when the people and states were jealous of encroachments by the Federal government. Section 1979 was passed first in 1871, and then re-enacted in 1874, *in order to enlarge* the jurisdiction of the Federal Court and give efficiency to the Fourteenth Amendment. The two purposes being opposite, if they are in conflict, the later must be held to modify the scope of the former.

The object of the bill in equity is to obtain primary equitable relief by the cancellation or conveyance to the plaintiff of an outstanding claim amounting to a cloud, and incidentally to arrest the proceeding at law, on the ground that this proceeding at law, owing to the limited jurisdiction of the law court, will do an injustice to the complainant in the equity proceeding, and irreparable injury.

And in such case under the enlarged power of the Federal Courts to enforce the Fourteenth Amendment, in an "action at law or suit in equity, or other proper proceeding for redress" (R. S., Sec. 1979), Section 720 is not effective to deprive the court of jurisdiction.

This proposition received the attention of the court in *Tuchman* v. *Welch*, 42 F. R., 548, decided in 1890.

Judge PHILLIPS, with whom Judge FOSTER sat and concurred, quoted the passages from Justice BRADLEY'S opinion, above cited, and held that under Section 1979 this Federal remedy existed, and essentially construed Section 720 (prohibiting injunctions against proceedings in State Courts), as modified in scope by Section 1979.

That section does not deprive the United States Court to enjoin proceedings in a State Court as ancillary to

granting principal relief in a case in which the Federal Court has jurisdiction.

In *Schandler Bottling Co.* v. *Welch*, 42 F. R., 561, the same two judges decided the same question the same way.

Judge CALDWELL differed from the two judges who rendered these two decisions, and in *Hemsley* v. *Myers*, 45 F. R., 283, took occasion to express his difference of opinion. But the bills were then held bad on other grounds, so that his decision on the point was unnecessary.

The weight of the opinions by Mr. Justice BRADLEY in 1870, who refrained from giving relief because Congress had not then acted, of the succeeding action by Congress in 1871, of the two decisions by Judges PHILLIPS and FOSTER, and of the decision by the Circuit Court below in the Terre Haute case, 82 Fed. R., 943, is clearly in support of the view which we maintain, that under the original constitutional power, under the Fourteenth Amendment, and Section 1979, the Federal Courts have the necessary powers to enjoin such proceedings when incidental to the principal relief sought.

In *Holt* v. *Indiana Mfg. Co.*, 176 U. S., 68, it is said of the provisions of Section 1979 "that they refer to *civil* rights only, and are inapplicable here." And, further:

> "Treating this bill as setting up a case arising under the constitution and laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subject to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, *or for any other reason*, the difficulty is

> that the pecuniary limitation of over two thousand dollars applied, and the taxes in question did not reach that amount."

And the bill was ordered dismissed for this reason. It is a permissible inference that the second clause quoted above from the opinion in that case dispenses with the need of the first.

"For any other reason," italicised above, means,—"arising under the constitution and laws of the United States for any other reason" than those connected with patent laws,—and therein includes causes arising under Sec. 1979. That is, the cause was dismissed because of the lack of pecuniary amount involved, and required by the legislation of 1887-8, even though it be a case arising under Sec. 1979, and so might be considered as arising under the laws of the United States. (That is, Sec. 1979 itself is controlled by the later pecuniary requirement of $2,000 just as Sec. 720 is controlled by the later requirement of Sec. 1979.) The expression that Sec. 1979 refers only to "civil rights" was therefore not necessary to the decision reached.

And it is permissible to say that in the constitutional sense all property rights are *"civil rights;"* and that *property* rights secured by the constitution are protected by Sec. 1979.

The original idea that the Fourteenth Amendment and the statute to enforce it were intended merely for the protection of the colored race and to secure the rights of "citizenship" to newly made citizens is a recurrent and persistent one, and although now thoroughly disposed of by this court in *Santa Clara Co.* v. *Southern Pac. Railroad*, 118 U. S., 394; *C., B. & Q. R. Co.* v. *Chicago*, 166 U. S., 226,

and *Smith* v. *Ames*, 169 U. S., 466, its counterpart restrictive interpretation of Section 1979 will probably be the subject of a similar enlargement. "A gradual process of judicial inclusion and exclusion" has been applied to the provisions of the Amendment, as Mr. Justice MILLER observed in *Davidson* v. *N. Orleans*, 96 U. S., 104; and while Mr. Justice MILLER there held to the narrower view, as he did in the Slaughter House Cases, the broader view expressed in the same cases, in the opinions of Chief Justice CHASE and of Justices FIELD, BRADLEY and SWAYNE (83 U. S., pp. 83-130), and in the opinion of Mr. Justice BRADLEY (96 U. S., 107-8), is now generally recognized as the true view.

As this court said, in *Holden* v. *Hardy*, 169 U. S., 366, at 385 (per Mr. Justice BROWN): "The cases under the Fourteenth Amendment demonstrate that in passing on the validity of state legislation under it, this court has not failed to recognize the fact that the law is to a certain extent a progressive science;"—and we submit that the progressive view taken by the court of the Amendment itself inevitably leads to the same broader interpretation of the statute passed to enforce it.

Sec. 1979 provides:

> "Every person who under color of any statute * * * of any state, * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights * * * secured by the Constitution, * * * shall be liable to the party injured in an action at law or *suit in equity*, or other appropriate proceeding for redress."

We submit that the appellee is causing appellant to be subjected to deprivation of her property rights secured by the constitution, under color of this statute and decision of Illinois, in violation of this statute;—that more than

$2,000 is involved;—and that pursuant to Section 1979 he is liable to her in this suit in equity for redress thereof.

IV.

Appellant's Title And Appellee's Cloud Thereon.

These arise as follows:

McCune to Johnson, trustee: Trust deed or mortgage (with full covenants of title), August 13, 1868.

McCune to Prettyman: Conveyance of equity of redemption, November 30, 1868.

Default and entry for Mrs. Bradley, mortgagee, November, 1871. (Tr., pp. 53, 65, 75, 6.)

Foreclosure sale to Mrs. Bradley, October 27, 1879.

Prettyman to Lightcap, quitclaim deed, November 30, 1894.

The cloud in the last-mentioned quitclaim deed, by the mortgagor's grantee, made after appellant had had the equitable title, had held possession, and had paid taxes for twenty-three years.

It carried only what the mortgagor had to give; and the mortgagor had nothing to give. Any after-acquired title of said mortgagor passed by his original covenants of title to appellant.

But this cloud is raised through the color given to it by the state court's decision, into what it calls the real title to the property. And this decision is in breach of the constitution.

The Federal jurisdiction of the bill to remove a cloud, to quiet the title and compel a conveyance is indisputable.

Treating the bill simply as a bill to quiet complainant's

(appellant's) title, federal questions are necessarily involved and the jurisdiction of the federal court is beyond dispute.

Prettyman's quit-claim deed to Lightcap (the ejectment plaintiff, appellee), recorded November 30, 1894, over thirty years after Mrs. Bradley had entered for condition broken, would convey no title but for the unconstitutional construction of the Act of 1872. Prettyman's title had been foreclosed and his right, title and interest in the premises had been terminated many years before he conveyed to Lightcap. Except for the fact that the State of Illinois had passed an unconstitutional statute and the Supreme Court of Illinois had declared it to be constitutional, and had given it retroactive effect against her in possession for condition broken, there would be nothing in the conveyance of Prettyman to Lightcap which would appear to carry title or constitute a cloud for equity to remove.

It is because the unconstitutional statute, and the unconstitutional retroactive application of it by the Illinois Supreme Court in the ejectment case, have *apparently* given that Prettyman title validity, that there is a cloud, and it arises through breach of the United States constitution.

In *Alexander* v. *Pendleton*, 8 Cranch., 462, the Supreme Court, MARSHALL, C. J., sustained a bill to quiet title *and restrain the defendants from asserting title*, in spite of a previous adverse judgment in ejectment in the state court; and this on the ground of the possessory title of the plaintiff in equity.

In *Ruckman* v. *Cory*, 129 U. S., 387, the court decreed a conveyance to the plaintiff by the holder of a cloud after such holder had maintained ejectment at law and obtained a judgment.

There B executed and delivered to C his bond in 1855 to convey to him a tract of land for a consideration named. C entered into possession, but borrowed money of R to pay for the land. C made valuable improvements on the place. Later, at C's request, the title was conveyed to R as security. Later C paid R all that was due him and then R conveyed the property to a woman, without consideration, and then married her. The wife then brought ejectment against C and recovered. C took a new trial under the statute and then in 1883 filed this bill to compel a reconveyance of the land to him. This court held that C's remedy was in equity; that he had not committed such laches as would close the doors of a court of equity against him—that the evidence in the record was sufficient to support a decree in his favor; *laches cannot be imputed to one in peaceable possession of land under an equitable title for delay in restoring to a court of equity for protection against the legal title;* since possession is notice of his equitable rights, and he need assert them only when he finds occasion to do so; that laches are rather to be imputed to the defendant who, although claiming to have been the absolute owner since 1862, took no action against the plaintiff until the ejectment suit was instituted. (Citing *Mills* v. *Lockwood*, 42 Ill., 111-118.)

The Supreme Court of Illinois has similarly held that laches cannot be imputed to one in peaceable possession of land for delay in resorting to a court of equity to perfect his title. The possession is notice to all of the possessor's rights and he need assert them only when he may find occasion to do so.

Wilson v. *Byers*, 77 Ill., 76-84.

In *Wehrman* v. *Conklin*, 155 U. S., 314, the court decreed the complainants to be the true and lawful owners of the land and their title to be quieted against the claims of the defendant, who was perpetually enjoined from setting up the same and from prosecuting an action of ejectment already begun. The facts in that case present many points of similarity to those here, including upwards of twenty years' possession, and payment of taxes and making of large improvements by the plaintiff with the knowledge and acquiesence of the defendant and those under whom he claimed.

"The law is well settled that where title to real property is concerned equity has concurrent jurisdiction, because it may not only enjoin an action at law, but may order a cancelation of the fraudulent conveyance and prohibit the bringing of further suits at law upon the fraudulent title, and thus afford a more complete relief than is possible in a court at law." *Ibid.*

Clark v. *Smith*, 13 Pet., 195; *Holland* v. *Challen*, 110 U. S., 15; *Reynolds* v. *Crawfordsville Bank*, 112 U. S., 405; *Chapman* v. *Brewer*, 114 U. S., 158; *Gormley* v. *Clark*, 134 U. S., 338; *Sharon* v. *Tucker*, 144 U. S., 533; *Roberts* v. *N. P. R. Co.*, 158 U. S., 1, are a few out of the many cases in which the court has maintained this jurisdiction and granted such relief as concurrent with and superior in efficiency to jurisdiction at law to try titles.

V.

THE UNITED STATES COURT HAS JURISDICTION TO PROTECT CITIZENS AGAINST CHANGES OF LAW BY JUDICIAL DECISION OR OTHER ACTS OF THE STATE DEPRIVING THEM OF PROPERTY WITHOUT COMPENSATION OR IMPAIRING CONTRACTS ENTERED INTO IN RELIANCE ON THE LAW AS IT STOOD PREVIOUS TO THE CHANGE.

Rowan v. *Runnels*, 5 How., 134.

State Bank of Ohio v. *Knoop*, 16 How., 369.

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 416, at 432.

Burgess v. *Seligman*, 107 U. S. (17 Otto), 20.

Buncombe Co. Comrs. v. *Tommey*, 115 U. S., 122, 127 (per Mr. Justice HARLAN).

Pana v. *Bowler*, 107 U. S., 541.

Comrs. v. *Thayer*, 94 U. S. (4 Otto), 631, at 642.

Clark v. *Bever*, 139 U. S., 96, at 117 (per Mr. Justice HARLAN).

Folsom v. *Ninety Six*, 159 U. S., 611, 625.

Ill. Central R. Co. v. *Adams*, 180 U. S., 28.

(For the ruling on this point in this last case see quotation therefrom under Point I. *supra.*)

It is clear from the opinions of the Supreme Court of Illinois in this litigation that this result of impairing the obligation of appellant's contract and depriving her of her property, in violation of the constitution, is accomplished by force of the statute of 1872. This is shown by us in our briefs in cases 243 and 306 on the present docket. The decisions of the state court could not have been reached in any other way. But there is apparent an effort to find some justifications for the decision and re-

sult in new rulings on the law of mortgages, which rulings are themselves wide departures from the settled law which became a part of the contract here. The Federal court on this bill can protect appellant against such radical changes by which her vested rights and estate are destroyed, even if done by or with the aid of a change in the judicial decisions of the state.

This jurisdiction distinguishes this bill from that filed in the State Court.

Central Land Co. v. *Laidley*, 159 U. S., 103.

And impairment by judicial construction of a statute is just as much prohibited as by legislative words.

Gelpcke v. *Dubuque*, 68 U. S. (1 Wall.), 175.
Butz v. *Muscatine*, 75 U. S. (8 Wall.), 675.
Chicago v. *Sheldon*, 76 U. S. (9 Wall.), 50.
Louisiana v. *Pilsbury*, 105 U. S., 278, at 295.

The law of mortgages in Illinois as a branch of the substantive law of property has been changed or departed from by the decision of the Supreme Court of Illinois in *Bradley* v. *Lightcap*, 186 Ill., 510, *et seq.*

This change of law by judicial decision impairs the obligation of the mortgage contract held by Mrs. Bradley, and will deprive her of her property without due process of law.

The Federal courts have original jurisdiction to protect Federal citizens against such change.

This bill was filed to obtain such protection for Mrs. Bradley.

The Illinois law of mortgages applicable hereto, and the history of the change are set out above in the brief and argument.

They are more shown in our brief in case No. 306, to which we beg to refer. We summarize here to say:

The English common law of mortgage was adopted in Illinois.

A mortgage is a conditional conveyance of the fee. After condition broken, the title becomes absolute in the mortgagee, who may recover possession as against the mortgagor.

After foreclosure and sale the mortgagor has only an equity of redemption.

Such was the law of the state as promulgated by the courts of last resort at and before the date (August 13, 1868) of the mortgage contract in question in this case.

By the law of Illinois, as promulgated and enforced by the courts of last resort at and prior to the date of said mortgage contract, if the mortgagor and his grantees failed to redeem the mortgaged premises from foreclosure sale within the time limited by the statute, and the decree of foreclosure, his equity of redemption was barred and foreclosed, and thereafter he had no further title to the premises.

By said law of Illinois as it existed at the date of the mortgage contract the equity of redemption of said McCune and his grantee, Prettyman, was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of the sale to appellant (Rev. Stat., Ill., 1845; Sec. 13; Chap. 57), and by the express provisions of the decree of foreclosure the defendants, McCune and Prettyman, and all persons

claiming under them since the commencement of the foreclosure suit February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within twelve months after October 27, 1879. And by the repeated decisions of the courts of last resort of said State of Illinois it had become a fixed rule of property at and prior to the date of said mortgage that the mortgage conveyed the fee, subject to conditional defeasance; that after condition broken the title became absolute in the mortgagee, who was entitled to recover possession of the premises.

The final order and decree of the Supreme Court of Illinois (in 186 Ill., 510), establishing a different rule of law, to wit: That the title of the mortgagor is not completely divested by the foreclosure and sale and expiration of the period of redemption, but survives, and that the title of the mortgaged premises did not become absolute in the mortgagee, but that all her right, title and interest ceased January 27, 1886, unless she sooner secured a deed from the master in chancery, and that the mortgagee is not longer entitled to hold possession as against the mortgagor and his assigns, deprives appellant of the right, title and interest vested in her under the laws of the state as they existed at the date of her mortgage, and when the condition was broken and when she took possession, and violates the prohibition of the Fourteenth Amendment of the Federal Constitution.

Chicago, Burlington & Quincy R. R. Co. v. *City of Chicago,* 166 U. S., 226.

Scott v. *McNeal,* 154 U. S., 34 (45).

Ex parte Virginia, 100 U. S., 339, 346-7.

Yick Wo v. *Hopkins,* 118 U. S., 356.

Smyth v. *Ames*, 169 U. S., 466, 526.

Covington, &c., Turnpike Co. v. *Sandford*, 164 U. S., 578.

Barrow S. S. Co. v. *Kane*, 170 U. S., 100, at 111.

Tindal v. *Wesley*, 167 U. S., 204 (222).

It is this change of law impairing her mortgage contract which injures Mrs. Bradley, and which, whether done by statute or by judicial decision, elevates the quit-claim deed (from Prettyman, the grantee of her mortgagor, to Lightcap, the defendant) from a mere cloud upon her title into an adverse paramount title.

It was to remove that cloud, raised by that decision in violation of the Federal Constitution, into an adverse and paramount title, that she filed this bill.

Among the assignment of errors she attacked said decision as follows:

"14. The Honorable Court below erred in not holding and deciding that there exists in this case a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America and said Section 10 of Article 1, and said Section 1, Article 14, thereof, as applicable *to the change of judicial construction of the law of mortgage contracts made by said Supreme Court of Illinois* subsequent to the date of your petitioner's mortgage contract by which her remedy thereunder was materially impaired."

In *State Bank of Ohio* v. *Knoop*, 16 H., 369, this court decided that:

> "In construing the constitution of a state, this court will adopt a settled construction, existing when the contract in question was made, acquiesced in by all the branches of the government, and under the

authority of which the contract was entered into, and reject a more recent decision by the highest court of the state, as not affording the rule for such a case." (Syllabus, by B. R. CURTIS.)

And in *Ohio Life Insurance and Trust Company* v. *Debolt,* 16 How., 416, at 431-2, the court, in applying the same rule, said:

"And upon a question as to the validity of such a contract the court, upon the soundest principles of justice, is bound *to adopt the construction* (of the constitution) *it received from the state authorities at the time the contract was made.*

"It was upon this ground that the court sustained contracts made in good faith in the State of Mississippi, under an existing construction of its constitution, although a subsequent and contrary construction, given by the courts of the state, would have made such contracts illegal and void. The point arose in the case of *Rowan and Others* v. *Runnels,* 5 How., 134. And the court then said, that it would always feel itself bound to respect the decisions of the state courts, and, from time to time, as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to fol-

low the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, *or decision of its courts*, altering the construction of the law." (Per Mr. Chief Justice TANEY.)

It was this rule which was applied in *Gelpcke* v. *Dubuque*, 68 U. S. (1 Wall.), 175, 206. On the page last cited the court (by Mr. Justice SWAYNE) quoted the language of Mr. Chief Justice TANEY from 16 Howard, 432, as above, and then added to and applied it as follows:

"The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

In *Burgess* v. *Seligman*, 107 U. S. (17 Otto), 20, at 33, 34, this court states the basis of the jurisdiction here as follows:

"The Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that *by the course of their decisions certain rules are established which*

> *become rules of property and action in the state*, and have all the effect of law, *and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes.* Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon *under a particular state of the decisions*, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts *after such rights have accrued.*"

Here the courts of Illinois had, by the course of their decisions, established rules of property in regard to real estate mortgages which it would be wrong to disturb; and thereupon this mortgage contract was entered into under this particular state of the decisions; and the Supreme Court of Illinois now does disturb this rule of property after her rights have accrued.

In *Pana* v. *Bowler*, 107 U. S., 529, 540, 541, the court states and applies the same rule in terms equally clear.

In *Folsom* v. *Ninety Six*, 159 U. S., 611, at 625-6, the court (per Mr. Justice GRAY) quotes from *Burgess* v. *Seligman*, 107 U. S., 33, as above, and then adds:

> "In the case at bar the statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township, and were purchased by the plaintiff in 1886. It is alleged in the complaint, and admitted by the demurrer, that he pur-

chased the bonds, relying upon their being legal and valid obligations of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the legal profession, and by the legislative, executive and judicial departments of the state. And the decisions of the Supreme Court of the state, during the same period, appear to have assumed the validity of such bonds. *Chambee* v. *Tribble*, and *Carolina Railway Co.* v. *Tribble*, above cited.

"The decision in *Floyd* v. *Perrin*, holding such bonds to be invalid, was by two judges only, against a strong dissent, and was not made until November 30, 1888, and a rehearing was denied December 14, 1888. Eight days after, on December 22, 1888, the legislature passed an act, to take immediate effect, declaring the bonds previously issued, in behalf of any township, to be debts of the township, and providing for their payment by taxation of the inhabitants. Five months later, on April 15, 1889, the Supreme Court of the state, in two labored opinions, the one by Chief Justice Simpson and the other by Justice McIver, declared that, it having been decided in *Floyd* v. *Perrin* that the legislature could not authorize the township to levy a tax to pay the bonds, it could not ratify the proceedings of the township; but yet that the Statute of 1888 was a constitutional exercise of the unlimited legislative power to authorize taxation for a public purpose, with the consent of the township. In each of the two cases, however, Justice McGowan, who had dissented from the judgment in *Floyd* v. *Perrin*, delivered a concurring opinion in these words: 'I concur. The meaning of the opinion of the court being that there is no necessity for the issue of any new bonds; but "the debt" fixed upon the several townships by the Act of 1888 shall be represented by the bonds heretofore issued, to be paid according to the provisions of the act; and I am authorized to say that such is the view of the other members of the

court.' *State* v. *Whitesides* and *State* v. *Neely*, above cited.

* * * * * *

"There not being shown to have been a single decision of the state court against the constitutionality of the Act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina."

The principle stated in these cases, that the law as settled by judicial decisions of the state previous to the making of the contract forms part of the obligation of the contract made in reliance thereon;—and that a subsequent change of the law by judicial decision is controlled by the Federal constitution, and cannot be allowed to impair that contract right or deprive the party thereto of her property, makes it plain that a federal question is necessarily involved by such change of the law of property in the present case.

The decisions in *Bacon* v. *Texas*, 163 U. S., 207, at 221, and *Turner* v. *Wilkes Co. Comrs.*, 173 U. S., 461, at 463, in error to the Supreme Court of the state declining to review such decisions, expressly hold that where such question comes up on appeal from the Federal Circuit Court this court will review the same upon the merits and not be bound by the decision of the state court. And the same is held in *Central Land Co.* v. *Laidley*, 159 U. S., 103.

VI.

THE INJUNCTION PRAYED BY COMPLAINANT'S BILL IS NOT ESSENTIAL TO THE RELIEF SOUGHT.

THE PRAYER FOR INJUNCTION DOES NOT DEFEAT THE JURISDICTION OF THE COURT.

We have shown (*supra, pp.* 8-9, in statement) that the bill concluded with *eleven* prayers, which aside from those for (1) *answer,* (10) *general relief,* a (11) process.—were the typical prayers of a bill to establish and quiet a title.

They were (2) to compel conveyance, (4) for surrender of deed, (5) cancellation thereof, (6) decree that the deed is a cloud, (7) that complainant's title be established by decree, (8) that her possession be confirmed, and (3) (and 9 for temporary writ) for injunction enjoining defendant from

(*a*) asserting ownership;

(*b*) taking possession;

(*c*) dispossessing complainant;

(*d*) denying complainant's title; and

(*e*) *alternatively* from prosecuting the ejectment suit.

The prayers for injunction (3) and (9), and particularly, the prayer 3 (*e*), which was *alternative* to the other relief for an injunction against defendants prosecuting the ejectment suit, might be stricken from the bill and still leave complainant's bill a complete bill, undoubtedly within the jurisdiction of the Federal Court.

To dismiss the suit on account of alternative subdivision (*e*) of prayer 3 is to treat it as the whole and ignore the rest. This was error.

The demurrer to the amended bill does not lie to the bill, because merely of supposed objections to the *prayer* of the bill.

Especially it does not lie to the whole amended bill merely because of supposed objections to two of the eleven prayers, *i. e.*, those for permanent and for temporary injunctions.

And, further, still, it does not lie because of supposed objections to the *fifth subdivision* of the prayer for injunction, which is made *alternatively* to the other subdivisions praying injunctions to which complainant's right is unquestionable.

Demurrers in chancery must be applied to the substantive averments of the bill, to the stating part which states the equity of complainant's case:

> "A demurrer cannot be good in part and bad in part; so that if a demurrer is general to the whole bill and there is any part either as the relief or the discovery to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled."
>
> 1 Daniell, Chy. Pr., 5th Ed., * * * 583-4.

> "And if any part of the bill is good, and entitles the plaintiff either to relief or to discovery, a demurrer to the whole bill cannot be sustained."
>
> *Livingston* v. *Story*, 9 Peters, 632, 658.

Therefore, the presence of the prayer for injunction against the ejectment suit was no ground for dismissing the bill.

Even if the trial court held that prayer for injunction against the ejectment suit were demurrable, the court should have retained the bill and directed the exclusion therefrom of that one prayer.

And we submit that the injunction prayed for against the ejectment suit was proper under the circumstances of the case, as ancillary to the undoubted jurisdiction to quiet complainant's title. And the Circuit Court itself sustained such injunction in *T. H. & Ind. R. R. Co.* v. *P. & P. U. R. R. Co.*, 82 F. R., 943. In that case the question whether this court was prevented, by Section 720, U. S. R. S., from enjoining the defendant from proceeding at law in a state court was directly raised. There, as in the case now before this court, an injunction was asked to stay a suit at law in the state court, to which there remained no legal defense. The P. & P. U. Ry. Co. brought suit to annul the lease of terminal facilities held by the T. H. & I. Ry. Co. for failure to pay the amount of rent demanded. Judgment of ouster was secured in the Circuit Court, and appeal allowed on giving bond to pay increased rent if the judgment was not reversed. The judgment having been confirmed by both the Appellate and Supreme Courts of the State,—suit was begun in the state court on the bonds. Then the T. H. & I. Ry. Co. filed its bill in the federal court for equitable relief, and injunction against the suit on said bonds. The court held the injunctive right necessary for its complete jurisdiction in the case, with its remedies, and that, to avoid limiting the jurisdiction of the federal court as fixed by the constitution, Section 720 must be held modified.

And the effect of R. S., Sec. 1979, was to make such modification. It is error to suppose that as between Sec. 720, enacted in 1793, and Sec. 1979, enacted in 1871, that the former overrides and narrows down the latter.

We append a copy of the opinion of the circuit judge (set out in Transcript, pp. 77-78).

The case there is not made to turn on the idea that the prayer for injunction deprived the court of jurisdiction, but on the idea that the state court had not acted on the remedy in equity.

And in this the learned circuit judge fell into error:

1. Because the state court, by its opinion quoted in the bill and by previous decisions in equity cases quoted, had denied that in their opinion appellant or one in her place, had any remedy either at law or in equity; and *inter partes,* this was not *obiter dictum,* but became the law of the case; and

(2) Because the equitable remedy to quiet her title was perfectly distinct from the ejectment suit; and not a *review thereof,* and as it involved federal questions, the Federal Court had concurrent jurisdiction of such bill to quiet title with the State Court, and the appellant had the right to proceed in either court.

After the final hearing of *Lightcap* v. *Bradley,* in the Supreme Court of Illinois, counsel considered the three courses open to them, viz.:

(1) To try the ejectment case under the rulings of the Supreme Court, and carry the case to the United States Supreme Court, or,

(2) To file their bill at once in the Circuit Court of the United States, and avoid the entanglements of previous decisions in the state court, at the same time reaching a final decision with but two hearings; or,

(3) To file a bill in chancery for injunction and relief in the state court, and in the event of an adverse decision in the state courts, which was plainly indicated in advance by the language of the opinion in the ejectment case, take it by writ of error to this court.

We submit that in choosing the second course we were justified by the decisions of this court on the quieting of titles and were avoiding unnecessary litigation.

The state court in equity "following the law," considered itself bound to apply the state statute in equity as well as at law. It is only in the Federal Court of Equity that the question can be dealt with.

To wait with the bill to quiet title until the plaintiff has succeeded in his *ejectment suit*, both in the State Circuit Court, in the State Supreme Court, and then, possibly (on the ground last suggested), in the United States Supreme Court is to wait several years for a settlement of the question. Then to file a bill to quiet title in the state court and go through the same process is to wait much more, and be met with the defense of *laches*. Meanwhile the defendant, successful in ejectment, may resort to writs of assistance and actions of forcible detainer against plaintiff's tenants, or induce them to attorn and collect or sue for rent from them. If this court should reverse the ejectment case it might be a reversal *for a new trial;* and more likely so if no federal bill were before it. The witnesses are likely to be dead by that time. And the defendant, if beaten in that trial, will then claim *his election* to a *statutory new* trial, with further appeals from that.

These are the very considerations which make the federal bill in equity to *quiet the plaintiff's title* more "practical *and efficient to the ends of justice and its prompt administration*," and therefore the only adequate remedy. (2 Peters, 214.)

Ruckman v. *Cory*, 129 U. S., 387.
Wehrman v. *Conklin*, 155 U. S., 314.
Holland v. *Challen*, 110 U. S., 15.

Sawyer v. *Parish of Concordia,* 12 F. R., 754.
Apgar v. *Christopher,* 10 F. R., 857.

In bringing to this court by simultaneous proceedings for review (1) the ejectment case, (2) the equity case in the Federal Court, to quiet the title, and (3) the equity case in the state court to enjoin the prosecution of the ejectment case, we are laying before this court for consideration all of the remedies which the alternatives above considered suggest might be pursued. We conceive that we are entitled so to do. Only by so doing can we avoid the suggestion that we ought to have chosen some other remedy. Only by so doing can we avoid the bar of a prosecution or a review of one or more of them by lapse of time.

And we conceive that good precedents for so doing are afforded by the cases of *Ill. Central R. Co.* v. *Adams,* 180 U. S., 28, and *Pullman's Palace Car Co.* v. *Transportation Co.,* 171 U. S., 138.

And for these reasons we respectfully submit that the decision below was erroneous and should be reversed; and that upon all the evidence before the court in the transcripts of the three cases, a judgment or decree should be ordered quieting the title of Mrs. Bradley, appellant herein, and plaintiff in error in the other cases.

Respectfully submitted.

JOHN S. MILLER,
MERRITT STARR,
W. W. HAMMOND,
For Appellant.

CHICAGO, February 26, 1904.

APPENDIX.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Lydia Bradley
vs.
H. W. Lightcap. } Memorandum Opinion.

GROSSCUP, *Circuit Judge:*

If the bill was before me in a case presenting diversity of citizenship, so that the court would have full concurrent jurisdiction with the state court in administering equity upon the state of facts disclosed, the supposed barrier to relief would probably be easily overcome. I do not look upon the statute of 1872 as one of limitation, in the same sense as a statute limiting the time within which foreclosure proceedings must be brought. In such a case suit is barred because of the presumption that the debt has been paid; and payment leaves the mortgagor, so far as the mortgage is concerned, the unencumbered owner of the property. But the failure to take out a deed within five years raises no presumption that the debt has been paid. It is, in effect, simply a limitation upon the time within which the foreclosure decree shall be availed of, and when such limitation has expired the parties are relegated to their rights, as if no foreclosure had been attempted. I do not see in the statute a purpose to forfeit the purchaser's title to the mortgagor—a forfeiture founded upon no equity whatever.

The difficulty of this case, however, is in the question of jurisdiction raised. The contention of the complainant

is that taking the allegations of the bill to be true, complainant has two sources of title: (a) title by purchase under the foreclosure decree, and (b) title by possession as mortgagee; that the statute of 1872, as construed by the Supreme Court in the ejectment case, in effect deprives her, not simply of the title first named, but also of any title whatever to her as mortgagee in possession; and that as thus construed the statute deprives her of property without due process of law, and impairs, in an essential part, the contract embodied in the mortgage, and entered prior to the passage of the statute.

As the case went first to the Supreme Court, possession as mortgagee was not averred; on the contrary, the court found that the complainant chose foreclosure, and that thereby all her other claims to the property were merged in the foreclosure proceedings. But it is now insisted new evidence was introduced upon the new trial, showing substantially that complainant was, prior to the passage of the act of 1872, in possession as mortgagee, and from this it is argued that the Supreme Court, on the second hearing, must have held that the statute of 1872 had the effect of cutting off complainant's title as mortgagee in possession, as well as her title as purchaser at the foreclosure. If such be the effect of the Supreme Court's ruling, undoubtedly there is raised a substantial constitutional question.

I do not see in the statute itself any such purpose, and I cannot impute to the court an interpretation that does not arise out of the case before it. It is not clear to me that the court meant to hold that, in an appropriate suit in equity the complainant's title as mortgagee in possession would be cut off by force of the statute of 1872. Either the Supreme Court ruled that such title was or was not involved in the ejectment suit. If the former,

then the federal question is already presented in the ejectment record, and its review cannot be by bill in equity in the federal circuit courts, but by writ of error to the Supreme Court of the United States. If the latter—that is, that such title as mortgagee in possession, was not involved in the ejectment suit—then the Supreme Court has not passed upon the effect of the statute upon such title as it may be asserted in equity.

The demurrer, for want of jurisdiction, will be sustained.

Endorsed: Filed May 22, 1902. Marshall E. Sampsell, Clerk.